Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ROBERT DAVID CAMPBELL, - PETITIONER

v.

SHERMAN HATCHER, et al., - RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT DAVID CAMPBELL

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108 pp

QUESTIONS FOR REVIEW

I.

Whether Petitioner's right to effective assistance of counsel under the Sixth Amendment was violated when Petitioner's retained counsel failed to tell him to file a "notice" of appeal and the time limitations involved, following the state's imposition of six(6) illegal sentences, based up this Court's previous ruling in Lozada v. Deeds, 498 U.S. 430, 111 S.C. 860, 112 L.Ed.2d 956(1991); 964 F.2d 956 (9th Cir. 1992); 110 Nev. 349, 871 P.2d 944 (Nev. 1994); 72 F.3rd 135 (9th Cir 1995)(unconditional release affirmed)(Appeal after remand 964 F.2d 956 and unconditional release of Lozada by the district court).

II.

Whether Petitioner has a vested liberty interest under 28 U.S.C. § 2254 (b)(1)(B)(i) there is an absence of available State corrective process and (B)(ii) circumstances exist that renders such process ineffective to protect the rights of the applicant. Accord Wicker v. State, 111 Nev. 43, 888 P.2d 918 (1995).

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THE CASE

ROBERT DAVID CAMPBELL v. SHERMAN HATCHER, 9th Cir. 1998, Case No.98-15261;

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THE STATE OF NEVADA, v. ROBERT DAVID CAMPBELL, Nevada Eighth Judicial District Court 1985, Case No. C70346.

JURISDICTIONAL STATEMENTS

Jurisdiction of this Court is invoked due to the following:

1. On April 15, 1998, the United States Court of Appeals for the Ninth Circuit denied Petitioner's request for a certificate of appealability from the United States District Court for the District of Nevada's denial of Petitioner's Writ of Habeas Corpus pursuant to 28 U.S.C., § 2254, by a Person in State Custody.

2. On January 27, 1998, the United States District Court, District of Nevada, issued an order denying a certificate of probable cause.

3. On Dec. 12, 1997, Petitioner filed my Notice of Appeal with the district court.

4. On November 12, 1997, the United States District Court for the District Court of Nevada issued an order denying Petitioner's third motion for reconsideration.

5. On July 22, 1997, the United States District Court for the District Court of Nevada, Robert J. Johnston, United States Magistrate Judge, issued an

order stating that he had reviewed Petitioner's Motion for reconsideration and, **good cause appearing**, ordered Respondents shall file a response to Petitioner's Motion (#10).

6. On May 27, 1997, the United States District Court for the District Court of Nevada, issued an order denying Petitioner's Motion for Reconsideration of the court's Order (#4) and Judgment (#5).

7. On November 4, 1996, the United States District Court for the District Court of Nevada issued an order that dismissed, without prejudice, Petitioner's Motion for Clarification, construed by the court as a Motion for Reconsideration (#3).

8. On September 9, 1996, the United States District Court for the District Court of Nevada, issued an order stating that Petitioner asserted one unexhausted claim for relief. The court ordered that Petitioner shall have twenty (20) days from the date the order is entered to voluntarily dismiss the petition.

9. Pursuant to Rule 10(c) of the Rules of this Court.

PROVISIONS INVOKED

1. The Constitution of the United States, Sixth Amendment, and Fifth and Fourteenth Amendments.

2. The Constitution of the State of Nevada, Article 1, Section 8.

3. Title 28 U.S.C. § 2254 (b)(1)(B)(i) and (B)(ii).

4. All Applicable Nevada Revised Statutes.

STATEMENT OF THE CASE

A. BRIEF NATURE OF THE CASE

The state district court imposed six (6) illegal probation sentences on Petitioner on July 31, 1985. Because of the ineffective assistance of my retained counsel, Petitioner was denied the ability to exhaust state remedies to have the illegal sentences corrected, pursuant to 28 U.S.C. §2254(b)(1)(B)(i),B(ii). These remedies were:

1. Objection to the illegality of the sentences at pronouncement.
2. Modification or correction of the illegal sentences in the court of jurisdiction before the judgement was signed by the judge and filed by the clerk of the court.
3. Direct appeal to the Nevada Supreme Court.
4. Motion to the original court of jurisdiction to correct the illegal sentences.

Because my counsel wrote and told me that my sentences were legal, Petitioner believed them to be legal and, therefore, never filed anything to correct their illegality.

Ten years later, I discovered that my aforementioned six(6) illegal sentences were judged illegal, in another case, by my original court of jurisdiction and the court's procedure to correct the illegality put me in dire jeopardy of my liberty interest as the probation portion of the sentences would be deleted and the original sentences would be invoked. The state district court's procedure to correct the illegality was appealed to the Nevada Supreme Court, but that

tribunal affirmed the district court's remedy and therefore, the **issue** of my illegal probation sentences has been ruled on by both my original court of jurisdiction and the Nevada Supreme Court.

The issue of Petitioner's illegal sentences has been exhausted in the state court system, therefore, I have met the requirements of 28 U.S.C. § 2254(a)(b)(1)
(A) the applicant has exhausted the remedies available in the courts of the state;
(B)(i) there is an absence of available State corrective process;
(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

Because of the ineffective assistance of my counsel under the Sixth Amendment, I had to file a 28 U.S.C. § 2254. I have met the requirements of 28 U.S.C. § 2241(c)(3) which would allow me to obtain habeas relief because I made a substantial showing that I was denied a federal constitutional right to have effective assistance of counsel.

B. COURSE OF THE PROCEEDINGS, DISPOSITION AND STATEMENT OF THE FACTS.

Petitioner, represented by retained counsel, pled guilty, in the Eighth Judicial District Court of the State of Nevada, Clark County, Department X, to 10 counts in Case C-70346, and was sentenced, on July 31, 1985, (Appendix 17) to: Count I, 10 years; Count II, 10 years; Count IX, 10 years and Count X, 6 years, all in the Nevada State Prison. These sentences were consecutive to each other. Counts III through VIII, 10 years Nevada State Prison as to each count; sentence suspended and defendant place on probation for 60 years to begin after

prison sentence is served. Although sentencing was on July 31st, the Judgment was not signed by the judge until September 12 and filed by the clerk on September 13, 1985, 45 days after sentencing.

The state court violated Nevada law because probation can only last for a maximum of five(5) years from the date of pronouncement at sentencing. (NRS 176.215 - Appendix 15). The statute is quite clear, in pertinent part:

> 1. The period of probation or suspension of sentence may be indeterminate or may be fixed by the court and may at any time be extended or terminated by the court; but the period, **including any extensions thereoff must not be more than: (b) Five years for a felony, ... (emphasis added).**

There was no way that Petitioner could have completed Counts III through VIII within the five year statute mandate because minimum eligibility on Counts I, II, IX and X was more than seven(7) years. The sentences in Counts III through VIII were all illegal.

There was no objection by Petitioner's counsel to this illegal action by the court at sentencing. He remained silent. Petitioner accepted the court's sentences, but, as a layman, felt that "something" was wrong.

After being transferred to prison, Petitioner wrote to my counsel, Frank Cremen, letting him know that I felt that "something" was wrong with the sentencing and asked if the probation sentences could be modified. In his return letter, dated Sept. 12, 1985, Cremen spelled out the sentences (Appendix 18). He told me

that modification was not possible and that the **only** way I could get redress was to apply to the State Pardons Board after I had served some time. Because of what my counsel had told me, I believed the sentences to be legally correct, therefore, I never initiated any proceedings to have Counts III through VIII corrected.

Cremen's letter arrived on/about Sept. 13 or 14, 1985. My Judgment of Conviction was not "FILED" by the clerk of the court until Sept. 13, therefore, after receiving Cremen's letter, I still had nearly 30 days to file a notice of appeal, pursuant to Nevada Rules of Appellate Procedure,(N.R.A.P.) Rule 4(b) (Appendix 13). The rule is clear about when the notice shall be filed:

> In a criminal case, the notice of appeal by a defendant shall be filed in the district court within thirty(30)days after the entry of the judgment or order appealed from.

If Cremen had just told me that if I had **any problem** with **any phase of the judicial proceedings** in the case, that I should file a notice of appeal. The failure to file a notice of appeal was without my consent. The notice of appeal would have preserved the issue of the legality of the six(6) probation sentences and the appeal could have been perfected. Had Cremen told me to file the notice of appeal and the time limitations involved, he would have fulfilled his constitutional legal obligation to me. The filing of a notice of appeal, either by Petitioner or counsel, would not have obligated Cremen to perfect the appeal and the question of the legality or illegality of the sentencing phase of the

proceedings could have been preserved and the appeal could have been perfected. I had retained counsel to represent me during my court proceedings. I would have retained appeal counsel if I had just been told to file the notice. Petitioner accepted what my counsel had told me, so I continued to serve my sentences.

Ten (10) years later, Petitioner learned that my six(6) probation sentences were/are all illegal. While in the law library, I came across Wicker v. State, 111 Nev. 43, 888 P.2d 918 (Nev. 1995) (Appendix 24). This case is on point with Petitioner's. Both Petitioner and Wicker were sentenced by Judge Paul Goldman in Dept. X. We both received the same type probation sentences from Goldman. The current judge, Jack Lehman, ruled Goldman's probation sentencing structure illegal and decided that the right procedure to "correct" the illegality of Goldman's actions was to amend the judgment of conviction by deleting the probation portion of the sentences, which, in effect, caused Wicker to have to serve the sentences. Wicker appealed the decision and although it was by a 3 to 2 split decision, the Nevada Supreme Court affirmed the actions of Judge Lehman in the Wicker case.

After reading the case, Petitioner realized that I was in dire jeopardy of my liberty interest because I had six(6) probation sentences to begin serving upon my release from prison.

Following Petitioner's discovery of Wicker, supra. I telephone my retained counsel, Frank Cremen, on April 16, 1996. I explained everything about the Wicker case to him. He asked me to write to him about everything that we had discussed on the phone. In the letter, I completely

outlined everything that had happened in my case concerning the sentencing (Appendix 25).

I received a return letter from Cremen on May 7, 1996 (Appendix 26). In paragraph one(1) of his letter, Cremen admits that he thought the six(6) probation sentences that Petitioner received were legal. He went on to say that he disagrees with the Nevada Supreme Court decision in Wicker, supra.

In paragraph two(2) of the letter, Cremen's own words show that he never filed a notice of appeal nor told Petitioner to file a notice of appeal, pursuant to N.R.A.P. 4(b), if I had any questions about the legality of the sentencing phase of my case so that the matter could be reviewed by the Nevada Supreme Court. Petitioner did not consent to Cremen's failure to file a notice of appeal nor his failure to tell me to file a notice of appeal pursuant to N.R.A.P. 4(b).

Out of respect and comity for the judicial system, I had written the attorney who had represented me during my judicial proceedings. I wanted to give him a chance to respond, in writing, before I filed any legal action.

Petitioner knew that if I filed anything into my original state court of jurisdiction to have the illegal sentences corrected, the probation portion of the sentences would be deleted and the original sentences in the case would be invoked. Judge Lehman would have no choice in the matter. He had ruled in Wicker and that ruling was upheld by the Nevada Supreme Court, the highest court in the state. This had established case law and Lehman would have to continue to treat each defendant with illegal

probation sentences from Judge Goldman exactly as he had Wicker. It wouldn't matter which "**avenue**" I used to go back to state court; habeas corpus or correction of an illegal sentence (NRS 176.555) (Appendix 15), the result would be the same; deletion of the probation portion of the sentences and invoking the original sentences.

For the above reasons, I have met the requirements of 28 U.S.C. §2254(a)(b)(1)(A),(B)(i)and (ii).

Because of the ineffective assistance of my counsel under the Sixth Amendment, I had to file a 28 U.S.C. § 2254, based up this Court's previous ruling in Lozada v. Deeds, 498 U.S. 430, 111 S.C. 860, 112 L.Ed.2d 956(1991); 964 F.2d 956 (9th Cir. 1992); 110 Nev. 349, 871 P.2d 944 (Nev. 1994); 72 F.3d 135 (9th Cir 1995)(Appeal after remand 964 F.2d 956 and unconditional release of Lozada by the district court)[1] and Wicker v. State, 111 Nev. 43, 888 P.2d 918 (1995).

Based on **all** of the above, Petitioner filed my Federal Habeas Corpus petition on Aug. 21, 1996, **CV-S-96-754-LDG(RJJ).**

On Sept. 9, 1996, the district court issued an Order which stated that Petitioner had not exhausted his state remedies and gave me 20 days to voluntarily dismiss the petition (Appendix 8).

1. Petitioner, an institutionally assigned law clerk, assisted Lozada with his case from the day he arrived at the Southern Desert Correctional Center at Indian Springs, Nevada, through his **unconditional release** by the district court to U.S. Marshals, and finally, through the State's appeal of his release to the Ninth Circuit Court of Appeals (Release Affirmed, 72 F.3d 135).

On Sept. 27, 1996, Petitioner filed: "Petitioner's Motion For Clarification Of This Court's Order Entered On Sept. 10, 1996(#2)." Petitioner attempted to **clarify** to the district court that it was under the misconception that I had one unexhausted claim for relief. I pointed out that my claim was exhausted in both the state district court and the Nevada Supreme Court in Wicker v. State, supra, and that the provisions of 28 U.S.C. §2254(b), et al., had been satisfied and that 28 U.S.C. § 2254 was my **only** remedy for relief. I pointed out to clarify, section by section, how the habeas corpus petition showed that my claim had been exhausted.

On November 4, 1996, the district court filed an Order (#4) (APPENDIX 7) dismissing Petitioner's Motion For Clarification (#3). The district court told Petitioner to go back on state habeas corpus, pursuant to Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). I was extremely perplexed. When Petitioner was assisting Lozada with his case, I prepared a motion for his release because the **State of Nevada**, through its Nevada Supreme Court, **failed to obey this Court, the Ninth Circuit Court of Appeals and the district court** when it refused to give Lozada a direct appeal because his "Notice Of Appeal" wasn't filed within the time limits of N.R.A.P. - Rule 4(b), supra. The State of Nevada and the Nevada Supreme Court had been **ordered** to either **give** Lozada an out of time **direct appeal or release him**. The Nevada Supreme Court did neither. Instead, it told Lozada to go back on state habeas corpus. The Nevada Supreme Court also chastised the federal court system for telling it what to do. Lozada

v. State, 110 Nev. 349, 871 P.2d 944 (1994). The State of Nevada filed an Opposition to the Motion For Release and I assisted Lozada in filing a Reply. Shortly thereafter, the district court issued an order giving Lozada an unconditional release. Two days later, two U.S. Marshals came to the prison and Lozada was immediately released. The district court rejected the very argument that it was now telling Petitioner to do. Petitioner has no choice but to believe the district court is exercising a "double standard" when issuing its orders concerning the Lozada issue in my case.

On November 7, 1996, the district court filed a Judgment dismissing Petitioner's case without prejudice (#5)(Appendix 6).

On December 6, 1996, Petitioner filed:

> "Petitioner's Motion for Reconsideration Of This Court's Order (#4) and Judgment (#5) Entered On November 8, 1996"

Once again, Petitioner attempted to show the district court that I did have ineffective assistance of counsel and that I was in jeopardy of my liberty interest if I did what the court told me to do and went back to the state court on habeas corpus.

On March 6, 1997, Petitioner was released from prison on parole and on March 7, 1997, Petitioner filed a Notice of Change of Address with the district court. For the record, Petitioner has been released from custody of the Nevada State Prison system, but will be on parole on Count IX until December 27, 1999. Petitioner expired Count I on May 13, 1993, expired Count X on March 6, 1997 and expired Count II on January 24, 1998. Nevertheless, Petitioner has **not**

begun serving the six(6) illegal probation sentences. These are still pending.

On May 27, 1997, the district court filed an order denying Petitioner's Motion For Reconsideration of its Order (#4) and Judgment (#5) (Appendix 5).

Petitioner felt that I had good cause and merit and qualified to file my federal habeas corpus, but the district court didn't agree. Petitioner is in proper person, so in order to get a qualified legal opinion, I retained Las Vegas attorney Cal J. Potter, III, to completely review my federal habeas corpus petition. Potter was not an attorney that I picked at random. Potter has extensive experience in post-conviction matters and was the founder and President of the Nevada Appellate and Post-Conviction Project and is duly licensed to practice in the State and District of Nevada and is admitted to practice before the **United States Supreme Court**.

Petitioner told Potter that I had not retained him so that he would automatically agree with me. I told him that I wanted him to read my federal habeas corpus petition from beginning to end and then I wanted his honest legal opinion. Upon completion of his assignment, Potter gave me an affidavit stating that he had reviewed my habeas corpus and that he averred that it had merit and that it would be futile for me to go back to State Court because the **issue** has previously been **exhausted** in Wicker, supra, and Lozada, supra, (Appendix 27). Based on Potter's affidavit, Petitioner filed my:

MOTION FOR RECONSIDERATION AND HEARING ON THIS COURT'S ORDER

(#4) AND JUDGMENT (#5) BASED UPON AFFIDAVIT OF ATTORNEY CAL J. POTTER, III, ESQ., IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (#1) AND LETTERS FROM PETITIONER'S FORMER COUNSEL OF RECORD, FRANK J. CREMEN (EXHIBIT #6 AND #12 OF THE PETITION)

Besides Potter's affidavit, I included, for the second time, exhibits of both of Cremen's letters (Appendix 18 and Appendix 26).

On July 22, 1997, United States Magistrate Judge Robert J. Johnston issued an Order (Appendix 4) which said that he had reviewed my motion and <u>good cause appearing</u> he ordered the State of Nevada to file a response to my motion.

The State of Nevada answered Petitioner's habeas corpus and said that I should use a "Lozada" type writ; state habeas corpus. Of course the State is telling me to do as the Nevada Supreme Court ordered Lozada to do. The only thing the State forgot to mention is that Lozada rejected that remedy (state habeas corpus) and the federal district court agreed with him and gave him an <u>unconditional release</u>. If what the State says has merit, then maybe the State can answer one question for Petitioner, Where is Lozada? Is Lozada still in prison bogged down in the state court trying to get relief through state habeas corpus? NO ! Lozada is unconditionally **<u>free</u>** from his judgment of conviction. Two U.S. Marshals came to the prison and Lozada was unconditionally released on December 29, 1994. The State of Nevada Lost. Petitioner had assisted Lozada in preparing his motion for release

(Appendix 20), the State's Opposition To Motion For Release Order (Appendix 21) and Lozada's Reply Memorandum (Appendix 22). The district court then issued its order giving Lozada his freedom (Appendix 23). So, what kind of "Lozada" writ is the State talking about?, state habeas corpus or motion for release? The State appealed Lozada's release to the Ninth Circuit. Although Lozada had immediately left Nevada following his release and was living in Texas during the appeal, Petitioner kept in contact and assisted him in preparing all of the documents he needed in perfecting his portion of the appeal. It might be noted that although Lozada was more than a two thousand miles from the Ninth Circuit, he met all deadlines for filing his portion of the appeal, while the State of Nevada got permission to file a late "**Notice Of Appeal**" and a late opening brief. The Ninth Circuit Court of Appeals affirmed Lozada's release. The State of Nevada chose **not to appeal** Lozada's release back to **this Court**, so this case law stands: in Nevada, if a criminal defendant's counsel **fails to tell him** that if he feels anything is wrong with the proceedings to file a notice of appeal, and the time limitations involved, then the defendant has received ineffective assistance of counsel. In Nevada, the failure to file a notice of appeal must be with the **defendant's consent**. This is the reason Petitioner is so perplexed as to why the district court released Lozada and then told me to go back on state habeas corpus. Petitioner can only conclude that the district court has established a "**double standard**" concerning my habeas corpus petition.

Petitioner replied to the State's

Opposition but the district court wouldn't even give me a hearing.

On November 12, 1997, the district court filed an order denying Petitioner's motion and ordered that the clerk shall accept no further filings in the case (Appendix 3).

On December 12, 1997, Petitioner filed my Notice of Appeal with the district court.

On January 26, 1998, the district court filed and order stating that it would not issue a certificate of probable cause (Appendix 2).

On April 15, 1998, the United States Court of Appeals for the Ninth Circuit denied Petitioner's request for a certificate of appealability (Appendix 1).

This Petition for a Writ of Certiorari to this Court is the result of that Order.

SUMMARY OF THE ARGUMENT

On July 31, 1985, Petitioner was sentenced by the state district court on ten(10) counts. **Petitioner was denied effective assistance of counsel, as mandated by the Sixth Amendment,** when my retained counsel failed to object when said court imposed six(6) illegal probation sentences during sentencing. Petitioner's counsel failed to have the illegal sentences modified before the judgment was filed by the clerk of the court, after I had written to him inquiring if this could be done. Petitioner's counsel failed to notify Petitioner that if I felt anything was wrong with the proceedings I should file a notice of appeal within the time limits, so that any issue could be preserved and the appeal could be

perfected. Petitioner's counsel failed to notify me that, by state statute, an illegal sentence could be corrected at any time. In his letter, Petitioner's counsel convinced me that my sentences were legal.

Petitioner learned 10 years later that, indeed, the six(6) probation sentences he received were illegal and the state district court's method of "correcting" the illegality was to delete the probation and invoke the original sentence, therefore, **Petitioner is in dire jeopardy of my liberty interest** by unjustly being sent back to prison if I initiate any action in the state court system, as ordered by the district court. **Petitioner has met the requirements of 28 U.S.C. §2254(a)(b)(1)(A),(B)(i) and (ii).**

The district court is using a double standard concerning Petitioner's Petition for a Writ of Habeas Corpus because it mandates that I go back to the state court on state habeas corpus, when the district court unconditionally released Lozada, supra.

ARGUMENT

I.

This writ of certiorari is a claim of the denial of Petitioner's Sixth Amendment right to effective assistance of counsel at sentencing, where I received six(6) illegal probation sentences, which resulted in a violation of the Fourteenth Amendment right to due process and equal protection.

In Lozada v. Deeds, 498 U.S. 430, 111 S.C. 860, 112 L.Ed.2d 956(1991), this Court held "...Lozada made a substantial showing that he was denied the right to effective assistance of counsel. . . .

the issue of prejudice caused by the alleged denial of the right to appeal could be resolved in a different manner from the one followed by the District Court." **Id.** at 432.

In Lozada, counsel deprived him of his opportunity to appeal to the Nevada Supreme Court because he failed to inform him of his right to appeal, of the procedures and time limitations for an appeal and his right to appointed counsel. The case was remanded back to the Ninth Circuit, Lozada v. Deeds, 964 F.2d 956.(9th Cir. 1992) (We hold that prejudice is presumed under *Strickland* if it is established that counsel's failure to file a notice of appeal was without the petitioner's consent. . . . The writ should order Lozada's release from state custody unless Nevada allows Lozada to take a delayed appeal within a reasonable time.) **Id.** at 958-59.

Following a hearing in the federal district court, Lozada's counsel filed a notice of appeal in the state district court. When Lozada's appeal reached the Nevada Supreme Court, Lozada v. Deeds,110 Nev. 349, 871 P.2d 944 (Nev. 1994), it ruled it had to ". . . dismiss Lozada's appeal for lack of jurisdiction. . . . Our decision does not leave Lozada without a complete and adequate remedy. Lozada may obtain relief in the [State] district court by filing a petition for writ of habeas corpus." **Id.** at 946.

Lozada, rather than go back on a state writ of habeas corpus, filed with the federal district court, a Motion For Release Order Issuing Permanent Habeas Corpus to This Court's Order of 8/23/94. (See Appendices 20, 21, 22, and 23). Following Lozada's unconditional release the State appealed that release back to

the Ninth Circuit of Appeals. Lozada v. Deeds, 72 F.3rd 135 (9th Cir. 1995)(Appeal after remand 964 F.2d 956).

Petitioner's position is that I have ample written proof of retained counsel's ineffectiveness to the point of denial of effective representation within the meaning of the Sixth Amendment to the Constitution (See Appendix 18).

In fact, in paragraph two of his first letter, he said, in pertinent part:

> ". . . You did received probation on these sentences, but that probation is not to begin until your parole on the offenses for which you are doing the 36 years.
>
> I am aware of only one way by which you can get the sentence modified, and that is by application to the State Pardons Board." Id.

Based on Cremen's letter, he led me to believe that the six probation sentences were legal and that my **only** avenue for redress was the State Pardons Board. In actuality, modification was possible when Cremen received my letter of September 7, 1985, concerning the probation sentences because the judgment had not been signed by the judge or filed by the clerk of the court, in accordance with NRS 176.105(3)(The judgment must be signed by the judge and entered by the clerk.)(See Appendix 14). The judgment of conviction had not been signed by the judge nor filed by the clerk.(See Appendix 15).

Hence, the probation statute, NRS 176.215 clearly states, in pertinent part:

> 1. The period of probation or suspension of sentence may be indeterminate or may be fixed

> by the court and may at any time be extended or terminated by the court, but the period, **including any <u>extensions</u> thereof, must not be more than: (b) five years for a felony,. . .**(emphasis added). (See Appendix 15).

At this point in time, he had not even acknowledged that I had illegal probation sentences, furthermore, I received his letter on/about September 13 or 14, and my judgment of conviction was not filed until September 13, therefore, according to the Nevada Rules of Appellant Procedure, (N.R.A.P.) Rule 4(b):

> In a criminal case, the notice of appeal by a defendant shall be filed in the district court within thirty (30) days after the entry of the judgment or order appealed from. (See Appendix 13).

Petitioner still had nearly 30 days in which to file my notice of appeal, pursuant to N.R.A.P. 4(b), so that the issue of the illegal sentences could be preserved and the appeal could have be perfected. Cremen should have advised me that if I felt there was anything wrong with the sentencing, to file a notice of appeal and the time limitations involved. The failure to file the notice of appeal was without my consent. Under such circumstances there can be no waiver. cf. **<u>Johnson v. Zerbst</u>**, 304 U.S. 458, 58 S.Ct. 1019 (1938)(a constitutional right must be voluntarily, knowingly, and intelligently waived.); **<u>Brookhart v. Janis</u>**, 384 U.S. 1, 89 S.Ct. 1245, 16 L.Ed.2d 314 (1966)(for a waiver to be effective it must be clearly established that there was "an intentional

relinquishment or abandonment of a known right or privileged.)

Knowing that I felt there was "something" wrong with the probation sentences, Cremen should have told me that I could, pursuant to N.R.S. 176.555, have an illegal sentence corrected at any time. (See Appendix 16).

In light of the above, his legal representation fell below the objective standard of reasonableness and Petitioner was prejudiced by such assistance.

Counsel's lack of ability to correctly interpret the probation statute caused me extreme prejudice towards my future liberty interest. This is a violation of a substantial interest which Petitioner has a legitimate claim of entitlement. Olim v. Warinekoma, 461 U.S. 238, 103 S.Ct. 1741, 1747-48 (1983); Wainwright v. Sykes, 433 U.S. 72, 89, 97 S.Ct. 2497, 2507 (1977)(". . .violated a state procedural statute in the expectation that Petitioner's constitutional claim can be raised at a later date in federal court.)(See also Lozada, supra; cf. Sandin v. Conner, ___ U.S. ___ , 115 S.Ct. 2293, 2300 (1995) (Only the denial or misapplication of state procedures that results in the deprivation of a substantial right will implicate a federal recognized liberty interest.)

On July 29, 1991, six (6) years almost to the day after my sentencing, while incarcerated, Petitioner was summoned by the State to the probation department. I was shown a document which said that upon my release from prison, I must **immediately** report to the nearest Department of parole and Probation for Probation Supervision and that failure to do so could result in the violation of my

probation. I had to sign the document under duress. (See Appendix 19).

In 1995, Petitioner discovered, accord Wicker v. State, 111 Nev. 43, 888 P.2d 918 (1995), where the Nevada Supreme Court ruled that Petitioner's probation sentences were illegal.

> We note that nowhere in the statutory provisions regarding sentencing did the legislature authorize any sentences remotely similar to that imposed by Judge Goldman. In fact, NRS 176.215 prohibits this type of a sentence. (See Appendix 24)

The state district court amended Wicker's judgment of conviction to delete the probation portion of his sentences, which, in essence, caused him to have to serve the original sentences. Compare Petitioner's case with that of Wicker, supra.

Petitioner called attorney Cremen concerning the decision in the Wicker case. Since it had been more than 10 years since I had communication with Cremen, he asked that I write to him concerning everything that had happened in that case. (See Appendix 25).

In this return letter of May 7, 1996, Cremen said:

> "...I can advise you that in my opinion, in 1985 when you were sentenced, I would not have thought that the sentence that Judge Goldman gave you was at all illegal. Having read the Wicker case, I can advise you that I would have reached a decision different than the Supreme Court with regard to its interpretation of N.R.S.

176.215." (See Appendix 26).

Petitioner's liberty interest is at stake under Wicker, supra, and is subject to a number of restrictive conditions governing various aspects of my life and I would be regarded as "in custody" for the purpose of writ of habeas corpus. See Jones v. Cunningham, 371 U.S. 236, 241-243, 83 S.Ct. 373, 376-377 (1983); Peyton v. Rowe, 391 U.S. 43, 67, 88 S.Ct. 1549, 1556 (1968)(A prisoner serving consecutive sentences is "in custody" under any one of them).

Petitioner has attempted to set forth two liberty interests: my right to life and my right to equal protection under law. Petitioner has not forfeited these rights. See Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136 (1984) (Probation is custody for purpose of federal habeas corpus).

Petitioner's counsel's ineffectiveness is the **sole** reason I am in jeopardy of my liberty interest in violation of the Constitution.

Counsel's mistakes made concerning the sentencing are those of commission and omission, which cause actual prejudice in violation of due process under the Fourteenth Amendment to the Constitution.

Based upon all of the above, Petitioner, on August 21, 1996, while still incarcerated, was left with no choice and filed my Petitioner For A Writ of Habeas corpus Pursuant To 28 U.S.C. § 2254 By a Person In State Custody.

II.

Petitioner's case is identical to Wicker, supra, and the issue of the illegal sentences has been ruled on by my original court of jurisdiction. That decision has been appealed and upheld by the Nevada Supreme Court, therefore, case law has been established and my state remedies have been exhausted. The state district court cannot change its procedure to "correct" the illegal sentences and the Nevada Supreme Court cannot change its ruling in affirming that decision.

Although Petitioner **clearly** explained in my federal habeas corpus petition that the issue of my illegal sentences had been exhausted, the district court, mistakenly, asserted that I had one unexhausted claim for relief. The district court gave me twenty (20) days to voluntarily dismiss my petition (See Appendix 8).

In order to show the district court that Petitioner did not have an unexhausted claim, on September 27, 1996, I filed my "Petitioner's Motion For Clarification of This Court Order Entered On Sept. 10, 1996 (2).

On November 4, 1996, the district court filed an order dismissing petitioner's cause of action without prejudice and it was still under the misapprehension that Petitioner had not exhausted my state remedies, when the issue **had** been exhausted. Next the district court told me to go back on **state habeas corpus**, pursuant to Lozada v. State, 110 Nev. 349. Petitioner could not fathom that the court was actually using the Lozada "state" cite, when that very court released Lozada, unconditionally, when **he** objected to

going back to court on state habeas corpus (See Appendix 7).

As an institutionally assigned law clerk while incarcerated, Petitioner had assisted Lozada from the day he entered the reception center through December 29, 1994 when U.S. Marshals came to the institution and he was unconditionally released. Petitioner feels this court should know how the Lozada, supra, case concluded. (See Appendices 20, 21, 22 and 23). Following his unconditional release, the State filed an appeal back to the Ninth Circuit. The State filed its opening brief and Petitioner, still assisting Lozada even though he was physically in Texas, prepared his answering brief. Petitioner was actually representing the **district court in its decision to release Lozada**. It might be noted that the State of Nevada did not file a **reply** to Lozada's answer. The Ninth Circuit "Affirmed" Lozada's release Lozada v. Deeds, 72 F.3d 135 (1995).

The State of Nevada chose not to appeal the Ninth Circuit's affirmation of Lozada's unconditional release back to this Court, therefore, his unconditional release, because his counsel failed to file a notice of appeal and didn't inform him of the time limitations to file a notice of appeal, became a landmark decision.

The district court had told me to do what it didn't require Lozada to do. The district was applying a **double standard** to Petitioner's petitioner for a writ of habeas corpus. (Compare Appendices 6, 7 and 23).

On November 7, 1996, the district court filed a Judgment dismissing Petitioner's cause of action without prejudice. (See Appendix 6).

On December 6, 1996, Petitioner filed my "Petitioner's Motion For Reconsideration Of This Court's Order (#4) and Judgment (#5) entered On November 8, 1996".

On May 27, 1887, the district court filed an Order denying Petitioner's Motion (See Appendix 5).

Out of respect and comity for the legal system, Petitioner retained Las Vegas attorney Cal Potter, III, Esq., Founder and President of the Nevada Appellate and Post Conviction Project who is duly licensed to practice law in the State of Nevada, the District of Nevada and the **United States Supreme Court.** In an Affidavit, Potter averred that it would be futile to remand me back to state court because the issue had previously been **exhausted** in Wicker, supra, and Lozada, supra,(See Appendix 27). On June 2, 1997, Petitioner filed my Motion For Reconsideration and Hearing.

On July 22, 1997, United States Magistrate Judge Robert J. Johnston issued an order stating,

> "The court having reviewed Petitioner's Motion (#10) and good cause appearing therefore,
> IT IS ORDERED that on or before August 15, 1997, Respondents shall file a response to Petitioner's Motion(#10) (See Appendix 4).

The State of Nevada filed its Response and, basically, told Petitioner to do the same thing that the district court had told Petitioner to do; go back to state court on **state habeas corpus**, pursuant to Lozada v. State, 110 Nev. 349.

On September 9, 1997, Petitioner filed my:

> Reply Memorandum and general Traverse to Respondent's Opposition (#13) to Petitioner's Motion For Reconsideration (#10) Pursuant To This Court's Order Of July 24, 1997 (#11)

On November 12, 1997, the district court issued an Order denying Petitioner's third Motion for Reconsideration (See Appendix 3).

On December 12, 1997, Petitioner filed my Notice of Appeal the Ninth Circuit Court of Appeals.

On January 26, 1998, the district court filed an Order stating that it would not issue a certificate of probable cause (See Appendix 2).

On April 15, 1998, the Ninth Circuit Court of Appeals filed an Order denying Petitioner's request for a certificate of appealability (See Appendix 1).

This Writ of Certiorari is the result of that Order.

Petitioner has shown more than a mere technical violation to obtain such relief, and the issue of Petitioner's illegal sentences has been exhausted in the state court system, therefore, I have met the requirements of 28 U.S.C. § 2254(a)(b)(1)(A) the applicant has exhausted the remedies available in the courts of the state:

> (B)(i) there is an absence of available State corrective process;
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

Because of the ineffective assistance of my counsel under the Sixth Amendment, I had to file a 28 U.S.C. § 2254. I have met the requirements of 28 U.S.C. § 2241(c)(3) which would allow me to obtain habeas relief because I made a substantial showing that I was denied a federal constitutional right to have effective assistance of counsel. Lozada, supra.

Petitioner's claimed denial of effective assistance of counsel, rises to the level of a egregious jurisdictional defect. Pully v. Harris, 465 U.S. 37, 104 S.Ct. 871(1984). (To deny due process or equal protection); Reed v. Ross, 468 U.S. 1, 104 S.Ct. 2901 (1984).(Defendant has cause not to raise the claim under state procedure).

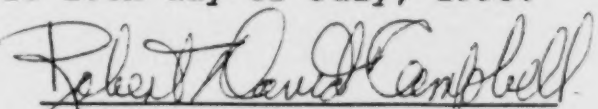
In cf. United States v. Trimmreck, 441 U.S. 780, 783-785, 99 S.Ct. 2085, 2087-88 (1979),the court expressly left open the question of what set of circumstances, if any, would support collateral relief stating:

> ...fundamental defect which inherently results in a complete miscarriage of justice, [or] an admission inconsistent with the demand of a fair procedure.

CONCLUSION

For all of the above-cited reasons, Petitioner respectfully requests the Petition for Writ of Certiorari be issued.

DATED this 13th day of July, 1998.



ROBERT DAVID CAMPBELL
Post Office Box 122
Las Vegas, Nevada 89125
Petitioner In Pro Per

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed
APR 15 1998
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ROBERT DAVID CAMPBELL,	)	No. 98-15261
	)	
Petitioner,	)	DC# CV-96-754-LDG
	)	Nevada(Las Vegas)
vs.	)	
	)	
SHERMAN HATCHER,	)	ORDER
	)	
Respondent.	)	

Before: BRUNETTI and RYMER, Circuit Judges

The request for a certificate of appealability is denied. See 28 U.S.C. § 2253 (c)(2).

No motions for reconsideration, modification, or clarification of this order shall be filed or entertained.

mocal/4.8.98/ka.2

ENTERED AND SERVED

JAN 27 1998

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY _____ DEPUTY

RECEIVED AND FILED

JAN 26 9 26 AM '98
LANCE S. WILSON
CLERK
BY _____
DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT DAVID CAMPBELL, Petitioner, v. SHERMAN HATCHER, et al., Respondents,	Case No. CV-S-96-754 LDG(RJJ) ORDER

Petitioner Robert Campbell has filed a notice of appeal (#17). As it is plain that Petitioner failed to exhaust his state remedies prior to bringing his motion pursuant to 28 U.S.C. § 2254.

THE COURT **ORDERS** that it will not issue a certificate of probable cause.

Dated this 23 day of January, 1998.

"s/ _____".
Lloyd D. George
United States District Judge

Appendix 2

ENTERED AND SERVED

NOV 13 1997

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY "s/ _____".DEPUTY
PAM STUCKI

RECEIVED AND FILED

Nov 12 10 52 AM '97
LANCE S. WILSON
CLERK
BY "s/ _____".
PAM STUCKI
DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT DAVID CAMPBELL, Petitioner, v. SHERMAN HATCHER, et al., Respondents.	Case No. CV-S-96-754 LDG(RJJ) **ORDER**

For good cause shown.

THE COURT **ORDERS** that Petitioner's third Motion for Reconsideration (#10) is DENIED;

THE COURT FURTHER **ORDERS** that the Clerk of the Court shall accept no further filings in this matter from Petitioner, and that this matter is closed.

DATED this 10 day of November, 1997.

"s/ _____".
Lloyd D. George
Chief United States District Judge

Appendix 3

ENTERED AND SERVED

JUL 24 1997

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY "s/ _____".DEPUTY
PAM STUCKI

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Jul 22 4 50 PM '97
LANCE S. WILSON
CLERK
BY "s/ _____".
PAM STUCKI
DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT DAVID CAMPBELL, Petitioner, v. SHERMAN HATCHER, et al., Respondents.	Case No. CV-S-96-754 LDG(RJJ) **ORDER**

This matter was submitted to the undersigned Magistrate Judge on Petitioner's Motion For Reconsideration (#10).

The court having reviewed Petitioner's Motion(#10) and good cause appearing therefore,

IT IS HEREBY ORDERED that on or before August 15, 1997, Respondents shall file a response to Petitioner's Motion(#10).

IT IS FURTHER ORDERED that the Clerk shall send a copy of this Order and the pleadings filed in this matter to

Appendix 4

Respondents.

IT IS FURTHER ORDERED that the Clerk shall send a copy of this Order and the pleadings filed in this matter to Respondents.

IT IS FURTHER ORDERED that the Clerk shall resubmit this matter upon the filing of a response or upon the expiration of the time for filing same.

DATED this 22d day of July, 1997.

"s/ _____".
ROBERT J. JOHNSTON
United States Magistrate Judge

ENTERED AND SERVED

MAY 13 1997

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY "s/ _____".DEPUTY
BONNIE HAMPTON

RECEIVED AND FILED

May 27 4 14 PM '97
LANCE S. WILSON
CLERK
BY "s/ _____".
BONNIE HAMPTON
DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT DAVID CAMPBELL,	
Petitioner,	Case No. CV-S-96-754 LDG(RJJ)
v.	
SHERMAN HATCHER, et al.,	**ORDER**
Respondents.	

Petitioner Campbell has filed a Motion for Reconsideration (#6) of the court's Order (#4) and Judgment (#5). Upon review, the court shall deny the motion.

IT IS THEREFORE **ORDERED** that Petitioner's Motion for Reconsideration of this Court's Order (#4) and Judgment (#5) is hereby **DENIED**.

DATED this 27th day of May, 1997.

"s/ _____".
Lloyd D. George
Chief United States District Judge

Appendix 5

ENTERED AND SERVED

NOV - 8 1996

CLERK, U.S. DISTRICT COURT

DISTRICT OF NEVADA

BY "s/ _____".DEPUTY
J.R.

RECEIVED AND FILED

Nov 7 9 37 AM '96

LANCE S. WILSON
CLERK

BY "s/ _____".
J.R.
DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT DAVID CAMPBELL, Petitioner, v. SHERMAN HATCHER, et al., Respondents.	Case No. CV-S-96-754 LDG(RJJ) **Judgment**

Pursuant to the Court's Order, this cause of action is hereby DISMISSED without prejudice.

DATED this 2 day of Nov, 1996.

"s/ _____".
Lloyd D. George
Chief United States District Judge

ENTERED AND
SERVED

NOV - 8 1996

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY "s/ _____".DEPUTY
J.R.

RECEIVED
AND FILED
Nov 4 10 42 AM '96
LANCE S. WILSON
CLERK
BY "s/ _____".
J.R.
DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT DAVID CAMPBELL, Petitioner, v. SHERMAN HATCHER, et al., Respondents.	Case No. CV-S-96-754 LDG(RJJ) **ORDER**

Petitioner has filed a Motion for Clarification (#3) which shall be construed as a motion for reconsideration.

Petitioner claims that his attorney failed to file a direct appeal or instruct him as to appeal procedure. H concludes that the alleged ineffective assistance of counsel eliminates the need to exhaust his state court remedies because state process is foreclosed. Furthermore, he claims the state process would be ineffective. In Nevada an untimely notice of direct appeal fails to

Appendix 7

vest jurisdiction in the State's supreme Court. See e.g., Jordon v. Housewright, 101 Nev. 146, 696 P.2d 998 (1985). However, the state of Nevada permits appellate-related issues to be raised in a habeas corpus if the petitioner can claim that he was denied his right to effective assistance of counsel on appeal, and thereby denied his right to appeal. Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1944). In such circumstances, the petitioner is to file a petition for writ of habeas corpus in the appropriate district court. See Nev. Rev. Stat. § 34.738 (1995). He may appeal to the Nevada Supreme Court from an adverse decision of the district court. Here, Petitioner has not exhausted these state court remedies. His ineffective assistance of counsel claim can be raised by means of habeas corpus proceedings in state court, where he will receive the assistance of appointed counsel pursuant to Lozada, 110 Nev. at 359. Therefore, the Court shall dismiss the cause of action.

///

IT IS THEREFORE **ORDERED** that Petitioner's Motion for Clarification (#3) shall be construed as a Motion for Reconsideration. The motion is hereby **DENIED.**

IT IS FURTHER **ORDERED** that Petitioner's cause of action is hereby **DISMISSED** without prejudice.

DATED this 2 day of Nov, 1996.

"s/ _____".
Lloyd D. George
Chief United States District Judge

ENTERED AND SERVED

SEP 10 1997

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY "s/ _____".DEPUTY
EFM

RECEIVED AND FILED
Sep 9 10 06 AM '97
LANCE S. WILSON
CLERK
BY "s/ _____".
EFM
DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT DAVID CAMPBELL, Petitioner,	Case No. CV-S-96-754 LDG(RJJ)
v.	
SHERMAN HATCHER, et al., Respondent.	**ORDER**

Petitioner has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner has also submitted a check for five dollars for the habeas corpus filing fee.

Petitioner asserts one unexhausted claim for relief. A federal court will not grant a state prisoner's petition for habeas relief until the prisoner has exhausted his available state remedies for all claims raised. Rose v. Lundy, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). State remedies have not been exhausted unless the claim has been fairly presented to the state courts and the

highest state court has disposed of the claim on the merits. Larche v. Simmons, 53 F.3d 1068, 1071 (9th Cir. 1995).

In light of petitioner's failure to exhaust state remedies as to the claim for relief, petitioner has essentially one option for future proceedings in this case: Petitioner may voluntarily dismiss the instant petition in order to pursue state remedies as to the unexhausted claim.

If Petitioner voluntarily dismisses the petitioner now before this Court, he may then proceed through the Nevada state court system in order to exhaust the currently unexhausted claim. Upon properly exhausting the claim, petitioner may seek federal habeas review of all possible grounds for relief. The advantage of this court of action is that it enables petitioner to argue all the claims for relief in a single federal proceeding. Furthermore, a voluntary dismissal of the instant petition would not prejudice petitioner's ability to seek federal habeas corpus relief through a subsequent petitioner. Should Petitioner decide to not voluntarily dismiss the petition, the court shall *sua sponte* dismiss the petition.

///

IT IS THEREFORE **ORDERED** that Petitioner shall have 20 days from the date that this order is **ENTERED** to voluntarily dismiss the petition.

DATED this 6 day of Sept, 1996.

"s/ _____".
Lloyd D. George
Chief United States District Judge

CONSTITUTION OF THE UNITED STATS:

AMENDMENT V - Prosecution by presentment, indictment; double jeopardy; self-incrimination; due process; property taken for public use. No person shall be held to answer for a capital, or a otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix 9

AMENDMENT VI - Right of accused in criminal prosecutions. In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Appendix 10

AMENDMENT XIV - Section 1. - Citizenship; privileges and immunities; due process; equal protection. All persons born or naturalized in citizens of the United *States and of the State wherein the* reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix 11

CONSTITUTION OF THE STATE OF NEVADA:

Article 1, Section 8. Rights of accused in criminal prosecutions; jeopardy; due process of law; eminent domain. No person shall be tried for a capital or other infamous crime (except in cases of impeachment, and in cased of the militia when in actual service and the land naval forces in time of war, or which this state may keep, with the consent of congress, in time of peace, and in cases of petit larceny, under the regulation of the legislature) except on presentment or indictment of the grand jury, or upon information duly filed by a district attorney, or attorney-general of the state, and in any trial, in any court whatever, the party accused shall be allowed to appear and defend in persona, and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without just compensation having been first made, or secured, except in cases or war, riot, fire, or great public peril, in which case compensation shall be afterward made.

(b) Appeals in Criminal Cases. In a criminal case, the notice of appeal by a defendant shall be filed in the district court within thirty (30) days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day therof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within thirty(30) days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within the thirty (30) days after entry of the judgment. When an appeal by the state is authorized by statute, the notice of appeal shall be filed in the district court within thirty days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is signed by the judge and filed with the clerk.

176.105 Judgment in a criminal action generally.

1. If a defendant is found guilty and is;

(a) To be committed to the custody of the director of the department of prisons for an evaluation by the department, the judgment of conviction must set forth the plea, the verdict or finding and the adjudication.

(b) Sentenced as provided by law, the judgment of conviction must set forth:

(1) The plea;

(2) The verdict or finding;

(3) The adjudication and sentence, including the date of the sentence, any term of imprisonment, the amount and terms of any fine, restitution or administrative assessment, a reference to the statute under which the defendant is sentenced and, if necessary to determine eligibility for parole, the applicable provision of the statute; and

(4) The exact amount of credit granted for time spent in confinement before conviction, if any.

2. If the defendant is found not guilty , or for any other reason is entitled to be discharged, judgment must be entered accordingly.

3. The judgment must be signed by the judge and entered by the clerk.

(Added to NRS by 1967, 1433; A 1973, 161; 1979, 1124; 1989, 938; 1993, 78)

176.215 Period of probation or suspension of sentence; arrest of defendant for violation of condition; powers and duties of peace officers.

1. The period of probation or suspension of sentence may be indeterminate or may be fixed by the court and may at any time be extended or terminated by the court, but the period, including any extensions thereof, must not be more than:

(a) Three years for a:

(1) Gross misdemeanor; or

(2) Suspension of sentence pursuant to NRS 453.3353; or

(b) Five years for a felony, except that for a felony involving a violation of the provisions of NRS 484.3795 the period must not be more than 10 years.

2. At any time during probation or suspension of sentence, the court may issue a warrant for violating any of the conditions of probation or suspension of sentence and cause the defendant to be arrested. Except for the purpose of giving a dishonora-

ble discharge from probation, and except as otherwise provided in this subsection, the time during which a warrant for violating any of the conditions of probation is in effect is not part of the period of probation. If the warrant is canceled or probation is reinstated, the court may include any amount of that time as part of the period of probation.

3. Any parole and probation officer or any peace officer with power to arrest may arrest to do so by giving him a

Appendix 15

written statement setting forth that the probationer has, in the judgment of the parole and probation officer, violated the conditions of probation. Except as otherwise provided in subsection 4, the parole and probation officer, or the peace office, after making an arrest shall present to the detaining authorities, if any, a statement of the charges against the probationer. The parole and probation office shall at once notify the court which granted probation of the arrest and detention or residential confinement of the probationer and shall submit a report in writing showing in what manner the probationer has violated the conditions of probations.

4. A parole and probation officer or a peace officer may immediately release from custody without any further proceedings any person he arrests without a warrant for violating a condition of probation if the parole and probation officer or peace officer determines that there is no probable cause to believe that the person violated the condition of probation.

(Added to NRS by 1967, 1435; A 1969, 639; 1973, 169,249; 1977, 814; 1979, 324; 1981, 370; 1983, 284; 1987, 761; 1989, 1119; 1991, 315, 1664)

4518

176.555 Correction of illegal sentence. The court may correct an illegal sentence at any time.

(Added to NRS by 1967, 1443)

Appendix 16

Filed
Sep 13 8 20 AM '85
Loretta Bowman
Clerk

Case No. C70346

Dept. No. X

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

THE STATE OF NEVADA,)
)
Plaintiff,)
)
-vs-) JUDGMENT OF CONVICTION
) (PLEA)
ROBERT DAVID CAMPBELL)
)
Defendant.)

WHEREAS, on the 5th day of June, 1985, the Defendant, ROBERT D A V I D CAMPBELL, appeared before the C o u r t herein with his counsel and entered a guilty plea to the crime of COUNT I THROUGH VIII: STATUTORY SEXUAL SEDUCTION; COUNT IX: LEWDNESS WITH A MINOR; COUNT X:, INFAMOUS CRIME AGAINST NATURE committed on the BETWEEN 11/23/84 and 12/23/84. In violation of NRS 200.368;201.230 201.190; and WHEREAS, thereafter on the 31st day of July, 1985, the defendant being present in Court with his counsel, Frank Cremen, and Paul E. Wormer, Deputy District Attorney, also being present; the above entitled Court did adjudge the Defendant guilty thereof by reason of his plea of guilty and sentenced Defendant to COUNT I: Statutory Sexual Seduction - to serve 10 years in Nevada State Prison; COUNT II: Statutory Sexual Seduction - to serve 10 years in Nevada State Prison; COUNT IX: Lewdness With A Minor - serve 10 years in Nevada State Prison; COUNT X: Infamous Crime

Against Nature - 6 years in Nevada State Prison. These sentences to be consecutive to each other. Counts III through VIII: Statutory Sexual Seduction - 10 years Nevada State Prison as to each count for a total of 60 years in Nevada State Prison; sentence suspended and defendant placed on probation for 60 years to begin after prison sentence is served. Sentence only suspended as to Counts III through VIII.

THEREFORE, the Clerk of the above entitled Court is hereby directed to enter this Judgment of Conviction as part of the record in the above entitled matter.

DATED this 12 day of Sept., 1985, in the City of Las Vegas, County of Clark, State of Nevada.

DA#85-7030346/em
LVMPD DR#84-93610/ID#124779

"s/_____".
Paul S. Goldman DISTRICT JUDGE

FRANK J. CREMEN
Attorney at Law

302 EAST CARSON
SUITE 1004
LAS VEGAS, NEVADA 89101

Telephone (702) 385-7475

September 12, 1985

Mr. Robert David Campbell-21297
P.O. 208-S.D.C.C.
Indian Springs, Nevada 89070
3B1

Dear David:

Thank you for your letter of September 7, 1985. Perhaps, it is fortunate that your mother did not get the first letter that I sent to her because in that letter I did specify the length of the sentence. I would like to thank you for the information that you provided me about the items a person that is going to be imprisoned can bring with him. Although I have been fairly successful with keeping people out of prison, it does happen that a client of mine will now and then go there as you well know. The information that you have provided me will be invaluable.

You did receive three consecutive ten year sentences and one consecutive six year sentence. The remaining sentences were for ten years and were suspended. You did receive probation of these sentences, but that probation is not to begin until your parole on the offenses for which you are doing the 36 years.

I am aware of only one way by which you can get the sentence you received modified, and that is by application to the State Pardons Board. The members of that Board are the Governor, the Attorney General and all the members of the Supreme Court. It is my understanding that this Pardons Board meets twice a year and considers applications that are recommended to it by the Executive Secretary of the Pardons Board.

Frankly, I do not think you would be wise to make an application to the Pardons Board so quickly after receiving your sentence. I believe that the Pardons Board will consider the application of someone who has been in prison for some time and who has shown himself by his conduct to be a person who warrants some consideration.

If there is any further information I can give you with regard to this, please let me know. I personally have never handled the application of someone who was seeking a pardon, but there is always a first time.

Sincerely yours,

"s/_____".
Frank J. Cremen
FJC/am

STATE OF NEVADA

STATE SEAL

DEPARTMENT OF PAROLE AND PROBATION

JULY 29, 1991

NAME: Robert Campbell
DOP#: 21297

PROBATION FILE #: V85/86-0143
CRIMINAL CASE #: 70346

You are hereby notified that upon your release from the Nevada Department of Prisons, either by Parole, or Expiration of your prison sentence, you must immediately report to the nearest Department of Parole & Probation for Probation Supervision. Failure to do so may result in the violation of your probation.

You may call one of the following phone numbers for the P&P office nearest your residence:

Carson City, Phone 687-5045
Reno, Phone 688-1000
Elko, Phone 738-4088
Las Vegas, Phone 486-3001

I have received a copy of the above and fully understand its contents.

"s/_____". "s/_____".
Robert D. Campbell Dorothy Van Dyke
PROBATIONER DATE PRE-RELEASE SUPERVISOR DATE
7-29-91

Appendix 19

RECEIVED
AND FILED
Nov 8 2 35 PM '94
CAROL C.FITZGERALD
CLERK
BY _____
DEPUTY

JOSEPH M. LOZADA
NDOP No. 23574
Southern Desert Correctional Center
Post Office Box 208
Indian Springs, Nevada 89070
Petitioner - In Propria Persona

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOSEPH M. LOZADA, Petitioner, vs GEORGE DEEDS, et al., Respondents.	CV-S-89-173-LDG(LRL) **MOTION FOR RELEASE ORDER ISSUING PERMANENT HABEAS CORPUS PURSUANT TO THIS COURT'S ORDER OF 8/23/93**

COMES NOW the Petitioner, in propria persona, and respectfully moves this Honorable Court for an order directing his immediate release from custody due to the State of Nevada's failure to comply with this Court's Order of August 23, 1993, **commanding** Petitioner be released, "...unless Nevada allows him to take a delayed **appeal** within a reasonable time." (Emphasis added)

This Motion is made and based upon the attached Memorandum of Points and Authorities and all pleadings and papers on file herein.

DATED this 4th day of November, 1994.

"s/_____".
Jose M. Lozada-NDOP No. 23574
Southern Desert Correctional Center
Post Office Box 208
Indian Springs, Nevada 89070
Petitioner-In Propria Persona

Appendix 20

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On August 4, 1993, this Court issued an Order that a hearing be scheduled for August 13, 1993 at 8:00 A.M., for the purpose of determining whether the failure to file a notice of appeal was without Petitioner's consent. The order addressed two affidavits which this Court had previously ordered submitted indicating whether Petitioner consented to no notice of appeal of this conviction being filed. One of the affidavits was by Petitioner and the other was by his retained counsel, Mr. James L. Buchannan II, Esq. The order also said that the affidavits of Petitioner and Mr. Buchanan differed, this the August 13th hearing would allow both parties to present additional facts indicating why no notice of appeal of Petitioner's jury conviction was timely filed.

As a result of said hearing, this Court determined that Petitioner had not consented to his counsel's failure to file a notice of appeal from his jury trial and that Petitioner was entitled to relief by way of a conditional writ ordering his release unless Nevada allowed him to take a delayed appeal within a reasonable time. Counsel for Respondents agreed with this Court and Petitioner and said that the State of Nevada would **not oppose** Petitioner taking a delayed appeal at this time. This Court, therefore, ordered the State of Nevada to either release Petitioner from custody or allow him to take a delayed appeal. This Court ordered James L. Buchanan II, Esq.. To file a notice of appeal in the Eighth Judicial District Court (EJDC) of the State of Nevada. This Court further ordered the case be referred to said EJDC for action

consistent with the opinion of this court.

2

Following the August 13th hearing and on that same day, James L. Buchanan II, Esq., filed a "Notice of Appeal" in the EJDC. (Exhibit 1) On August 17, 1993, Buchanan filed with this Court a "Certificate of Filing of Notice of appeal". (Exhibit 2)

On August 23, 1993, this Court officially file the Order and Judgment #32 & 33) in this case and found that Petitioner did not consent to his attorney's failure to take a direct appeal and that :...petitioner is entitled to relief by way of a conditional writ ordering his release unless Nevada allows him to take a delayed appeal within a reasonable time." The Court stated, "IT IS THEREFORE **ORDERED** that the State of Nevada either **release petitioner from custody** or allow petitioner to take a **delayed appeal** within a reasonable time." (Emphasis added)

The case was remanded to the EJDC, Department III, of the State of Nevada, Las Vegas, Nevada, the original trial court. The EJDC appointed the Clark County Public Defender's Office to handle the appeal. On February 16, 1993, Robert L. Miller, deputy public defender, filed Petitioner Lozada's opening brief in the Nevada Supreme Court. On March 30, 1994, The Nevada Supreme Court dismissed the appeal. Jose Manual Lozada vs. The State of Nevada, Docket No. 24996, 110 Nev. Adv. Op. 44, 110 Nev, ___, 871 P.2d 944 (1944) (Exhibit 3). The court stated, inter alia, that,

> This court lacks jurisdiction to entertain Lozada's appeal.

> Lozada filed a notice of appeal from this 1987 judgment of conviction well after the thirty-day appeal period prescribed by NRAP 4(b). We have consistently held that an untimely notice of appeal fails to vest jurisdiction in this court. See, e.g., Jordon v. Director, Dep't of Prisons, 101 Nev. 146, 696 P.2d 998 (1985). We must, therefore
>
> 3
>
> dismiss Lozada's appeal for lack of jurisdiction. (Exhibit 3, p.4).

The Nevada Supreme Court not only failed to obey the August 23, 1993 Order and Judgment of this Court, it also challenged the authority of the Ninth Circuit, "In light of the Ninth Circuit's failure to recognize the jurisdictional limitations on our authority to grant Lozada an appeal, we deem it necessary to detail Lozada's possible remedies. (Exhibit 3, p.4, l.9) (Emphasis Added) This court went of for 10 more pages to tell this court and the Ninth Circuit how **it** wanted Lozada to proceed, "Lozada may obtain relief in the district court by filing a petition for a writ of habeas corpus." (Exhibit 3, p.4, l.9) This Court's order did not tell Petitioner to file a writ of habeas corpus. It **commanded** the State of Nevada to release him or give him a delayed appeal within a reasonable time. The appeal was dismissed by the Nevada Supreme Court.

STATEMENT OF THE FACTS

The purpose of a conditional release order, like the one this Court

issued August 23, 1993, (#32 & 33), is to require the state, where it has not yet heard the prisoner's appeal, to do so within a specified time in order to cease its due process violation. The purpose has been defeated here. Elcock v. Henderson, 947 F.2d 1004, 1008-1009 (2nd Cir. 1991). Instead of granting Lozada a delayed appeal, the Nevada Supreme Court refused to exercise jurisdiction and order Petitioner to return to the trial court for another lengthy series of post-conviction proceedings. What the state offered Lozada here in no way complies with this Court's Order of 1993 and the 9th Circuit's Mandate in

Lozada v. Deeds, 964 F.2d 956 (9th Cir. 1992).

SUMMARY

This case has been in the state and federal courts for more than seven years and has gone all the way to the United States Supreme Court. The State of Nevada, through its Supreme Court, was given a final opportunity by this Court to grant Petitioner a direct appeal from his jury trial. Counsel for Petitioner obeyed this Court's August 23, 1993 Order and filed a Notice of Appeal with the EJDC. He also filed a Certificate Of Filing Of Notice of Appeal with this Court. The EJDC obeyed this Court's mandate and appointed the Clark County Public Defender's Office to perfect the appeal. The opening brief was filed with the Nevada Supreme Court, but said court refused to even hear the case. The State of Nevada has not complied with this Court's Order and Judgment in the case at bar.

REQUEST FOR RELIEF

Petitioner respectfully prays this Court will issue permanent habeas corpus, pursuant to its order of August 23, 1993, and Petitioner, Jose M. Lozada, shall be forthwith released from the Nevada Department of Prisons and the Eighth Judicial District Court, Clark County, Nevada, Department III, Judge Joseph S. Pavlikowski, shall, vacate Petitioner's conviction and sentence in Case No C-75275.

DATED this 4th day of November, 1994.

"s/_____".

Jose M. Lozada - NDOP No. 23574
Southern Desert Correctional Center
Post Office Box 208
Indian Springs, Nevada 89070
Petitioner - In Properia Persona

FRANKIE SUE DEL PAPA
Attorney General
By: STEPHEN M. SANVILLE
Deputy Attorney General
Criminal Justice Division
401 South Third Street, #500
Las Vegas, Nevada 89101
(702) 486-3420
Attorneys for Respondents

UNITED STATE DISTRICT COURT

DISTRICT OF NEVADA

* * *

JOSE M. LOZADA,) Case No. CV-S-89-173-LDG(LRL)
Petitioner,)
vs) **OPPOSITION TO MOTION FOR**
GEORGE DEEDS,) **RELEASE ORDER ISSUING**
et al.,) **PERMANENT WRIT OF HABEAS**
RESPONDENTS.) **CORPUS**

Respondents, through legal counsel, Attorney General FRANKIE SUE DEL PAPA, by Deputy Attorney General Stephen M. Sanville, oppose Petitioner JOSE M. LOZADA'S (LOZADA) Motion for Release Order Issuing Permanent Habeas Corpus Pursuant to this Court's order of 8/23/93." This Opposition is made and based upon the pleadings and papers on file herein, the following points and authorities, and such oral argument as may be requested.

DATED this 29th day of November, 1994.

FRANKIE SUE DEL PAPA
Attorney General

By: "s/_____".
STEPHEN M. SANDVILLE
Deputy Attorney General
Criminal Justice Division

Appendix 21

POINTS AND AUTHORITIES

I.

SUMMARY

This Court has already determined that LOZADA's trial counsel was ineffective because of counsel's failure to file a notice of appeal from the Judgment of conviction without Lozada's consent. However, the issue now becomes: what is the proper remedy that will restore to LOZADA that which he lost when his counsel failed to file a direct appeal, while at the same time maintaining the proper respect for the federalism and comity concerns inherent in federal habeas review of prisoners in state custody.

That issue has never been briefed or even raised by any of the parties to this action. Therefore, LOZADA's request that a writ be issued ordering his release is premature. Moreover, the proper remedy is not for this federal court to order the Nevada Supreme Court to entertain an appeal which, pursuant to state court law, is beyond their jurisdiction to hear. Instead, this Court may, as other circuit court have done, order that LOZADA's original Judgment of Conviction be vacated and a new judgment entered thereby giving the Nevada Supreme Court jurisdiction to hear a direct appeal. Or, it may accept the complete and adequate remedy outlined by the Nevada Supreme Court in its comprehensive March 30, 1994 Opinion. (Exhibit "A.")

II.

ARGUMENT

The purpose of any remedy ordered by this Court should be to give LOZADA that which he lost die to his counsel's failure to

file a direct appeal. What Lozada lost

was the benefit to have appointed counsel review the record for appealable issues as will as the right to raise those issues. There are at least two available remedies which do not require the Nevada Supreme Court to violate state law by considering an appeal beyond jurisdiction.

First, when confronted with the nearly identical issue, the United States Courts of Appeals in the First, Fourth, Eighth, and Tenth Circuits have avoided comity concerns by creating remedies which have naturally vested the lower courts with jurisdiction to hear a direct appeal. This has been accomplished by ordering, for example, that the "prior judgment of conviction and sentence should be vacated and a new judgment entered with would enable [petitioner] to appeal therefrom after such entry." **Estes v. United States**, 883 F.2d 645, 649 (9th Cir. 1989)(cited with approval by the Ninth Circuit when it remanded this matter to this Court); **United States v. Peak**, 992 F.2d 39, 42 (4th Cir. 1993) (remand "with instructions to vacate [petitioner's] judgment of conviction and enter a new judgment from which an appeal can be taken. . . ."); **Bonneau v. United States**, 961 F.2d 17, 23 (1st Cir. 1992) ("remanded to the district court so that petitioner can take a direct appeal . . . ."); **United States v. Davis**, 929 F.2d 554, 557 (10th Cir 1991) ("[the] proper remedy is a re-sentencing to enable defendant to perfect an appeal.")

This, the courts in each of the cases cited above did not attempt to compel other courts to perform an act which was beyond the power of those courts. Instead, the courts cited above structured their orders so as to create a situation in which the

lower courts had lawful jurisdiction to consider a direct appeal. That was not done in this case. As the Nevada Supreme Court stated in its Opinion filed March 30, 1994, the Nevada Supreme Court "lacks jurisdiction to entertain Lozada's appeal." Therefore, at least one proper remedy would be for this Court to order that LOZADA's original Judgment of Conviction and sentence be vacated and a new judgment entered from which LOZADA could take a direct appeal.

But, in fact, LOZADA has another remedy which was outlined in detail in the Nevada Supreme Court's Opinion. (Exhibit "A" p.4) ("[o]ur decision does not leave Lozada without a complete and adequate remedy.") In their Opinion, the Nevada Supreme Court explained that LOZADA could obtain complete relief by filing a petition for writ of habeas corpus in the state district court. Although the Nevada Supreme Court recognized that because LOZADA has previously petitioned the district court for post-conviction relief he must establish good cause and prejudice, the court then went on in great detail to rule that if LOZADA can show that his counsel did indeed fail to file an appeal without his consent, and this Court has already made that determination, the LOZADA has established both good cause and prejudice. (Exhibit "A" pp.4-13.)

Moreover, the Nevada Supreme Court recognized that "the appropriate remedy would be to allow Lozada an opportunity to raise in a petition for writ of habeas corpus any issues which he could have raised on direct appeal. (Exhibit "A" p. 14.) The Nevada Supreme Court also recognized that because convicted persons have the right to counsel on direct appeal, "the

appointment of counsel is essential to remedy the loss of the right to appeal," and, therefore, "if Lozada files a post-conviction petition for writ of habeas corpus, the district court should appoint counsel to assist Lozada." Therefore, under the remedy proposed by the Nevada Supreme Court, LOZADA would have the benefit of counsel to review the record for appealable issues and would be allowed to raise any and all issues that he could have raised in a direct appeal. LOZADA would have a complete and adequate remedy for his loss of the right to a direct appeal.

III.

CONCLUSION

Respondents respectfully request that this Court deny LOZADA'S Motion for Release Order and instead enter an order requiring him to follow the remedy outlined in the Nevada Supreme Court's March 30, 1994 Order. In the alternative, Respondents ask that this Court order LOZADA's original Judgment of Conviction and sentence be vacated and a new judgment entered.

DATED this 29th day of November, 1994.

FRANKIE SUE DEL PAPA
Attorney General

By: "s/_____".
STEPHEN M. SANVILLE
Deputy Attorney General
Criminal Justice Division

RECEIVED
AND FILED
Dec 15 3 00 PM '94
CAROL C.FITZGERALD
CLERK

BY _____
DEPUTY

JOSEPH M. LOZADA
NDOP No. 23574
Southern Desert Correctional Center
Post Office Box 208
Indian Springs, Nevada 89070
Petitioner - In Propria Persona

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JOSE M. LOZADA,) Petitioner,) vs) **GEORGE DEEDS,**) et al.,) Respondents.)	CV-S-89-173-LDG(LRL) **REPLY MEMORANDUM AND GENERAL TRAVERSE TO RESPONDENT'S OPPOSITION TO MOTION FOR RELEASE ORDER ISSUING PERMANENT HABEAS CORPUS PURSUANT TO THIS COURT'S ORDER OF 8/23/93**

COMES NOW the Petitioner, in propria persona, pursuant to Local Rule 140.5, to file the above-entitled Reply Memorandum and General Traverse To Respondent's Opposition To Motion For Release Order Issuing Permanent Writ Of Habeas corpus Pursuant To This Court's Order Of 8/23/93.

This Motion is made and based upon the attached Memorandum of Points and Authorities and all pleadings and papers on file herein.

DATED this 10th day of December, 1994.

"s/_____".
Jose M. Lozada - NDOP No. 23574
Southern Desert Correctional Center
Post Office Box 208
Indian Springs, Nevada 89070
Petitioner - In Propria Persona

Appendix 22

MEMORANDUM OF POINTS AND AUTHORITIES
REPLY MEMORANDUM AND GENERAL TRAVERSE

Respondents have, once again, completely evaded the issue at hand and have attempted to tell this Court what to do. Respondent's "Opposition", p.2, l.7, mistakenly states: "...the issue now becomes: what is the proper remedy that will restore to LOZADA that which he lost when his counsel failed to file a direct appeal,..." (Emphasis added) This is completely correct. Any idea such as this is procedurally barred.

Respondents readily admit that their new "proper remedy" issue, p.2, l.13, "...has never been briefed or even raised by any of the parties to this action." (Emphasis added) The "proper remedy" does not now become, it has already been decided; **release Petitioner or give him a delayed appeal.** At the August 13, 1993 hearing before this Court, Respondents resolved the matter and agreed to Petitioner getting a **direct appeal to the Nevada Supreme Court**. The Order and Final Judgment of this Court, of August 23, 1993, did not say if this doesn't work, come back and we'll try something else. The Order and Final Judgment **were** the "proper remedy". Now, Respondents come back with a contradictory position and a new "proper remedy".

Under the law of the case doctrine, a court is precluded from reexamining an issue previously decided in the same court, or a higher appellate court, in the same case. A & A Concrete v. White Mountain Apache Tribe, 781 F.2d 1411 (9th Cir. 1986), cert. Denied, 476 U.S. 1117, 106 S.Ct. 2008, 90 L.Ed.2d 659 (1986); United States v. Maybusher, 735 F.2d 366, 370(9th Cir. 1984), cert denied, 469 U.S. 1110,105 S.Ct. 790,83 L.Ed.2d 783 (1985).

Respondents, at the August 13, 1993 hearing before this Court, had more than ample opportunity to bring up all of the arguments that they are now trying to bring up in their Opposition, but they didn't. They agreed that Petitioner should have the right to a direct appeal, In fact, in the Order (#32) following the hearing, this Court said, "counsel for respondents indicated in the hearing, given the circumstances of the case and the instructions of the Court of Appeals, the State of Nevada would not oppose petitioner taking a delayed appeal at this time." (Emphasis added) In 1990, the Ninth circuit ruled that the State of Washington could not come back to Court with contradictory conclusions,

> Having persuaded the district court to deny appellant federal review on the ground that he had a adequate and available state remedy, the state cannot now be permitted to oppose appellant's petition for relief on the theory he was actually procedurally barred in state court. Because of the contradictory positions taken by the state, we hold in the alternative that the state is estopped from arguing in federal court that Russell's claims are procedurally barred. The state's attempt to argue that its positions were not contradictory is not persuasive. (Footnote omitted)

Russell v. Rolfs, 893 F. 2d 1033 (9th Cir. 1990), cert. denied, 501 U.S. 1260, 111 S.Ct. 2915, 115 L.Ed.2d 1078 (1991). In their Opposition, Respondents now want to reverse their former position. On August 13, 1993, Respondents said that

direct appeal was the right way. Now they are saying it is not. Even so, they are now procedurally barred from concocting new procedures that they want this Court and Petitioner to follow. Petitioner

officially objects to: Opposition, p.2, l.18 through l.24; p.3, l.7 thru l.24. A & A Concrete, U.S. v. Maybusher, Russell, supra. For the record, since this whole case concerns a **state** judicial system, why did Respondents, Opposition, p.3, l.7 through l.24, cite **federal cases** dealing **only** with 28 U.S.C. **2255** petitions? This is another effort on Respondent's part to mislead this Court. Nevertheless, this whole "proper remedy" theory is procedurally barred. Petitioner officially objects to the introduction of **any** new procedures in this case. The "proper remedy" has already been decided; **direct appeal or release from prison.**

On p.2, l.14 of Respondents' Opposition, counsel for Respondents is in error in his belief that, "...Lozada's request that a writ be issued ordering his release is premature." After more than seven years, how can the request for relief be premature? Is it because issues that he now wants raised were never previously raised? Respondents had ample opportunity to raise the "proper remedy" issue before the United States Supreme Court, the Ninth Circuit court of Appeals, and this Court at the August 13, 1993 hearing. Petitioner repeats that if Respondents had wanted to raise the proper remedy issues that they now want to raise, it's too late. They are procedurally barred. Petitioner's "Motion for Release Order Issuing Permanent Habeas Corpus Pursuant To This Court's Order Of 8/23/93" is not premature. The conditional Release Order was issued on

August 23, 1993. If this Court followed counsel for Respondents' request, this Court would have to tear up its previously issued Order and Final Judgment, because it was premature, and follow the dictates of Respondents

and the Nevada Supreme Court.

Respondent's Opposition, p.2,l.10, speaks of **respect** and **comity** concerning this federal court system and the State of Nevada. If counsel for Respondents had taken the time to read it, this very matter that he now brings up, respect and comity for the State of Nevada, has already been addressed in **Lozada v. Deeds**, 964 F.2d 956 at 959 (9th Cir. 1992). Although it ordered a writ to be issued ordering Lozada's release if this Court found that the failure to file a notice of appeal was without Lozada's consent, the Ninth Circuit showed **respect and comity** for the State of Nevada by making the writ **conditional**. It gave the state **another** chance to allow, "...Lozada to take a delayed appeal within a reasonable time." The Ninth Circuit based this respect and comity for the State of Nevada (allowing it **one more chance** to give Lozada a direct appeal) on a ruling it made eight years before in **Gardner v. Pitchness**, 731 F.2d 637, 639-640 (1984):

> We are mindful of the considerations of comity underlying the habeas writ, which require that state courts be given an opportunity to correct alleged violations before federal courts step in. At the same time, comity does not require that a petitioner file repetitious or futile petitions in state court. **Powell v. Wyrick**, 657 F.2d 222,

223-24 (8th Cir. 1981); **Rogers v. Wyrick**, 621 F.2d 921, 928 (8th Cir. 1980) Cf. **Matias v. Oshiro**, 683 F.2d 318, 320 (9th Cir. 1980)(petitioner need not seek **speculative** or **conjectural** state remedy that appears to be barred by state procedural rule). (Emphasis added)

from **Lozada**, supra.

Since the Order and Judgment (#32 & #33) of August 23, 1993 and **final**, Respondents had the opportunity to appeal that Order

and judgment back to the Ninth Circuit, see F.R.A.P. 3(a) and 4 (1)(1), et al., as applicable, but the state chose not to do this. Respondents are procedurally barred from attempting to force Petitioner down the "speculative" and "conjectural" garden path with two more procedurally barred new ideas. Gardner, supra.

It's ironic that Respondent's Opposition, p.2, l.10, asks the Court for **respect** and **comity** for the State of Nevada in one paragraph, and in the next paragraph counsel for respondents shows neither respect nor comity for this Court as he challenges the authority if this Court's Order and Judgment of August 23, 1993, saying that the remedy in those documents is not the "**proper** remedy". (Counsel for Respondents now dictates the "proper remedy" for both petitioner and this Court) Is counsel for Respondents a judicial member of a high tribunal to oversee the operations of this Court? Petitioner, though not a lawyer, is under the assumption that the Ninth Circuit court of Appeals and the United States Supreme Court perform these functions.

According to counsel for

Respondents, he does believe he has the authority to tell this Court what it should and shouldn't do, Opposition, p.2, l.15, "...the proper remedy is not for **this** federal court to order the Nevada Supreme Court to entertain an appeal which, pursuant to state law, is beyond their (sic) jurisdiction to hear." why wasn't this brought up at the August 13, 1993 hearing? Counsel for Respondents then tells this Court what to do, "Instead, this Court **may**..." counsel next gives this court **permission** to pick between two new alternatives that were **never raised** at the August 13, 1993 hearing and which are now procedurally barred.

- 6 -

Petitioner is perplexed. Counsel for the State of Nevada intentionally misrepresented to this Court, at the August 13, 1993 hearing, that Petitioner **could** get a direct appeal to the Nevada Supreme Court from his jury trial, but no new laws or appellate rules concerning a notice of appeal from a criminal jury trial have been enacted in many years. The laws and rules that were in effect on August 13, 1993, had been in effect and are still in effect today, so counsel for the State of Nevada **knew**, on August 13, 1993, that Petitioner could **not** get a direct appeal to the Nevada Supreme Court, yet he intentionally misrepresented to this Court and Petitioner that direct appeal was possible. **Based upon this intentional misrepresentation**, this Court issued the conditional Order and Final Judgement on August 23, 1993.

All parties concerned with this Court's Order and Judgment obeyed it, except the Nevada Supreme Court. Immediately following the August 23, 1993

hearing and on the same day, Lozada's trial counsel obeyed the mandate of this Court and filed a Notice of Appeal with the eighth Judicial District Court. (EJDC) On August 17, 1993 he filed the Certificate of Filing of Notice of Appeal with this Court. The case was remanded to the EJDC, Department III, of the State of Nevada, Las Vegas, Nevada, the original trial court. The EJDC obeyed this Court's Order and Judgment and appointed the Clark County Public Defender's Office to handle the appeal. On February 16, 1994, Robert L. Miller, deputy public defender, obeyed this Court's Order and filed Petitioner Lozada's opening brief in the Nevada Supreme Court. On March 30, 1994, the Nevada Supreme Court did not obey the Order and Judgment in this

case and refused to hear the appeal, Jose Manual Lozada vs. The State Of Nevada, docket No. 24996, 110 Nev. Adv. Op. 44, 110 Nev. ___, 871 P.2d 944 (1944). Since Respondents **knew**, at the August 13, 1993 hearing, that the Nevada Supreme Court would refuse to hear Petitioner's appeal, why did **Respondents waste the time and efforts** of Counsel Bucanan, the EJDC, Department III, Judge Joseph Pavlokowski, and **especially** deputy Miller of the Clark county Public Defender's Office? Respondent's actions caused Miller to spend futile time preparing and opening brief that was never going to be considered by the Nevada Supreme Court. This is an example of Respondents not giving respect and comity for the federal; court system and even its own state judicial system.

Respondents are under another misconception, In their Opposition, Argument, p.3, l.1, Respondents state, "What LOZADA lost was the benefit to have

appointed counsel **review** the record for appellate issues as well as to raise those issues." (Emphasis added) This is not true. Petitioner did not lose the right to have appointed counsel **review the record**, what Petitioner has been saying for seven years is that he lost the **right to direct appeal** to the Nevada Supreme Court.

Now, counsel for Respondents comes back before this Court, in their Opposition, to chastise this Court for issuing the Order and Final Judgment, which was based on Respondents intentional misrepresentation of the facts. Counsel intentionally misrepresented facts so that this Court would issue the conditional release Order, knowing that, pursuant to state law, direct appeal was beyond the Nevada Supreme Court's jurisdiction to hear. If counsel for Respondents had been truthful with this Court at the August

13, 1993 hearing, this Court would have been told that direct appeal was not possible and **Lozada could have been released at that time**. If, for nothing else, this Court has already more than maintained "...the proper respect for the federalism and comity concerns inherent in federal habeas review of prisoners in state custody." (Opposition, p.2 l.10).

On p.5, l.12, "Conclusion" of Respondents Opposition, counsel for Respondents is also in error when he requests that this Court, "...deny LOZADA's Motion for Release Order and Instead enter an order requiring his to follow the remedy outlined in the Nevada Supreme Court's March 30, 1994 Order." This is more than ludicrous. Once again, Respondents are reversing their previously agreed to position. If

Respondents didn't want Petitioner to have a direct appeal, why didn't they say so at the August 13, 1993 hearing? Respondents are telling this Court to **disregard** seven years of work by the federal court system and obey the mandate of the Nevada supreme Court. Respondents cry for respect and comity for the state, yet they show none for the federal courts. Petitioner officially objects to this request on the numerous grounds stated in the Reply Memorandum and General Traverse.

The next part of Respondent's Opposition, "conclusion", p.5, l.15, is another attempt to disobey this Court's previous Order and to tell this Court what to do instead; let's try this or let's try that; vacate this and enter that, ad infinitum. Petitioner hates to be redundant, but Respondents didn't being this up at the August 13, 1993 hearing. That was an **important hearing**, yet Respondents are treating it as if it were preliminary instead of conclusionary. They are procedurally barred from bringing this up

now, Petitioner must obey this Court's orders, why shouldn't the same apply to Respondents? Petitioner officially objects to this "alternative" on the numerous grounds stated in this Reply Memorandum and General Traverse.

This Reply Memorandum and General Traverse has been lengthy, but Petitioner has learned over the years that any arguments or objections must be completely aired at every step of the way, for new matters cannot be brought up after an opportunity has been granted to present them.

This case is over the failure of retained counsel to file **one piece of**

paper; a one page notice of appeal so that Petitioner could have direct appeal from his jury trial to the Nevada Supreme court.

Petitioner respectfully prays this Court will deny Respondent's Opposition, issue permanent habeas corpus, pursuant to its order of August 23, 1993, release Petitioner, Jose M. Lozada forthwith from the Nevada Department of Prisons and order that the Eighth Judicial District Court, Clark County, Nevada, Department III, Judge Joseph S. Pavlikowski, **shall** vacate Petitioner's conviction and sentence in Case No. C-75275.

DATED this 10th day of December, 1994.

"s/_____".
Jose M. Lozada - NDOP No. 23574
Southern Desert Correctional Center
Post Office Box 208
Indian Springs, Nevada 89070
Petitioner - In Properia Persona

ENTERED AND SERVED

DEC 27 1994

CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
BY"s/_____".DEPUTY
P.Johnson

RECEIVED AND FILED
Dec 27 7 51 AM '94
CAROL C.FITZGERALD
CLERK
BY"s/_____".
P.Johnson
DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOSE M. LOZADA,) CV-S-89-173-LDG (LRL)
Petitioner,)
v.)
GEORGE DEEDS,)
et al.,)
Respondents.)

ORDER

This matter is before the court on Petitioner's Motion for Release Order Issuing Permanent Habeas Corpus (#34).

This matter was remanded to the court by the Ninth Circuit in its opinion in Lozada v. Deeds, 964 F.2d 956 (9th Cir. 1992). The circuit instructed the court to determine whether Lozada's trial counsel failed to pursue and appeal without Lozada's consent and ruled that if the federal district court found that Lozada did not consent, a condition writ of habeas corpus should be granted. Id. At 959. The circuit then specified that in the event such a conditional writ was granted, it "should order Lozada's release unless Nevada allows Lozada to take a delayed appeal within a reasonable time." Id. (Citations omitted).

The court ordered Lozada and his trial counsel to submit affidavits on the controlling issue of consent to the failure to file a notice of appeal and

then held a hearing. The court then found that Lozada had not consented. See Order #32). At the hearing, counsel for the State of Nevada indicated to the court that given the circumstances if this case and the instruction of the Ninth Circuit in Lozada, the State of Nevada would not oppose Petitioner taking a delayed appeal.

Therefore, pursuant to the instruction in the Lozada decision, the court granted a conditional writ and ordered the State of Nevada to either release Petitioner from custody or allow him to file a delayed appeal within a reasonable time. Pursuant to the instructions of this court, notice of appeal was filed by counsel for Petitioner on August 17, 1993.

On March 30, 1994, the Nevada Supreme Court dismissed Petitioner's appeal for lack of jurisdiction. Lozada v. Deeds, 871 P.2d 944 (Nev. 1994). Although the Nevada Supreme Court decision denied the relief ordered in this court's conditional writ, it attempted to set forth an adequate remedy by outlining to Petitioner how he could pursue further post-conviction relief. Petitioner now comes before the court requesting the relief granted to him in the conditional writ.

The language of the Ninth Circuit's decision in Lozada, provided for two alternative remedies: Petitioner's release or a grant by the State of Nevada of an out-of-time appeal. Despite the direct instruction of the Ninth Circuit, the Nevada Supreme Court has determined that it is without jurisdiction to grant Petitioner a delayed appeal. Due to the failure of the State of Nevada to permit Petitioner to take an out-of-time appeal as ordered by the Ninth Circuit and this

court, the court is left with no alternative except to grant Petitioner his release.

Accordingly, good cause appearing,

IT IS HEREBY ORDERED that Petitioner's Motion for Release Order Issuing Permanent Habeas Corpus (#34) is granted.

IT IS FURTHER ORDERED that Petitioner's Petition for Writ of Habeas Corpus is unconditionally granted.

IT IS FURTHER ORDERED that the State of Nevada will release Petitioner from custody upon receipt of this Order.

DATE:"s/ 22 Dec 1994 ".

"s/_____".
LLOYD D. GEORGE
Chief United States District Judge

James Rick WICKER, Appellant,

v.

The STATE of Nevada, Respondent.

No. 24492

Supreme Court of Nevada
Jan. 25, 1985

Morgan D. Harris, Public Defender and Robert B. Amundson, Deputy Public Defender, Clark County, appellant.

Frankie Sue Del Papa, Atty. Gen., Carson City, Rex Bell, Dist. Atty., James Tufeland, Chief Deputy Dist. Atty. and Ronald C. Bloxham, Deputy Dist. Atty., Clark county, for respondent.

OPINION

SHEARING, Justice:

In 1977, appellant James Rick Wicker was found guilty, pursuant to a jury trial, of two counts of robbery, one count of rape and three counts of infamous crime against nature. On December 6, 1977, Judge Paul Goldman sentenced Wicker to a fifteen-year sentence for one of the robbery counts and to a consecutive life sentence with the possibility of parole for the rape count ("the first two sentences").

Judge Goldman further sentenced Wicker to a fifteen-year term for the other robbery count and the three life sentences with possibility of parole for the infamous crime against nature counts,

with all sentences running consecutively to each other ("the last four sentences"). Judge Goldman then suspended these last four sentences and placed Wicker on probation for a period of five years, with such probation to commence following his parole from prison on the first two sentences.[1]

In 1991 Wicker was paroled from prison and or March 7, 1991, was placed on probation.[2] On May 19, 1992, the Department of Parole and Probation filed a Probation Violation Report with Judge Jack Lehman reflecting that Wicker had violated the terms of his probation by absconding probation supervision. On March 1, 1993, the state filed a motion for revocation of probation. Since Wicker was also on parole, he was in violation of this parole as well. Wicker's parole was revoked prior to his appearance before Judge Lehman. At the March 19, 1993 probation revocation hearing, Wicker questioned the legality of Judge Goldman's sentence and the probation revocation hearing was continued. On

1. Wicker subsequently appealed his convictions to this court but did not raise the issue of the legality of Judge Goldman's sentencing structure. This Court affirmed the convictions. *Wicker v. Nevada*, 95 Nev. 804, 603 P.2d 265 (1979).

2. Wicker was originally released on parole April 18, 1988; however, for some unexplained reason, he was not placed on probation at that time. In 1990 Wicker's parole was revoked and he was returned to prison. Wicker's parole and probation records are not part of the record on appeal. However, the dates were set forth in Wicker's opening brief and the state verified these dates with the Department of Parole and Probation in Carson City. This court therefore takes judicial notice of the parole and probation dates pursuant to NRS 47.130.

March 25, 1993, wicker filed a motion to set aside Judge Goldman's sentences. On April 16, 1993, another hearing was held at which Judge Lehman ruled JudgeGoldman's sentencing scheme illegal. Judge Lehman then ordered that the judgment of conviction be amended to delete the probation portion of Wicker's sentences. Wicker appeals Judge Lehman's ruling, arguing that while Judge Lehman correctly ruled Judge Goldman's sentencing illegal, he erred in eliminating probation. For the reasons set forth below, we affirm Judge Lehman's order.

I. THE LEGALITY OF JUDGE GOLDMAN'S SENTENCES

In holding Judge Goldman's sentencing structure illegal, the district court relied on *State v. District Court*, 85 Nev. 485, 457 P.2d 217 (1969). In that case, the district court sentenced the defendant to ten years, suspended eight years of the sentence, and placed the defendant on three years probation following two years of incarceration. 85 Nev. at 486, 457 P.2d at 217. This court held that such a sentence constituted a judicial invasion into the legislative and executive fields, in contravention of the Nevada Constitution's separation of powers provision, article 3, section 1. 85 Nev. at 488, 457 P.2d at 218-19.

We decline to reach the separation of powers issue in this case because we have determined that Judge Goldman's sentencing structure violated both the letter and spirit of this state's statutory provisions regarding sentencing, probation and parole. *See Hollis v. State*, 96 Nev. 207, 210, 606 P.2d 534, 536 (1980) (this court will not consider constitutional issues unnecessary to determination of appeal);

Spears v. Spears, 95 Nev. 416, 418, 516 P.2d 210, 212 (1979).

We note that nowhere in the statutory provisions regarding sentencing did the legislature authorize any sentence remotely similar to that imposed by Judge Goldman. In fact, NRS 176.215(1)[3] prohibits this type of sentence. Pursuant to NRS 176.215(1), the period of probation or suspension of a sentence may not exceed five years form the felonies committed in this case. In the instant case, while the period of probation for the last four sentences did not exceed five years, the period of suspension of these four sentences inevitably exceeded five years at the time it was imposed. This is so because the last four sentences, if they were to occur, could only occur following the granting of probation for the first two sentences. The life sentences then existing for "forcible rape" required a mandatory five-year period of in-

carceration before eligibility for parole.[4] and NRS 213.120 as it then existed required that Wicker serve at least one-fourth of the fifteen-year sentence for robbery less "good time credits." Therefore, at the time Wicker was sentenced, the last four sentences

3.NRS 176.215(1) provides in pertinent part:

> The period of probation or suspension of sentence may be indeterminate or may be fixed by the court and may at any time be extended or terminated by the court, but the period, including any extensions thereof, must not be more than:
>
> ....
>
> (B) five years for a felony, except that for a felony involving a violation of the provision of NRS 484.3795 the period must not be more than 10 years.

At the time Wicker was sentenced, this section was the same in all important respects.

Were inevitably suspended for more than five years, contrary to NRS 176.215(1). Moreover, the purpose behind the limitation perdio in NRS 176.215(1) is to set some sort of time limit over a district court's power over a particular defendant. Under a sentencing scheme such as that imposed by Judge Goldman, the district court could exercise control over a defendant indefinitely, depending upon the number and length of sentences the defendant serves before he is granted probation. Thus, we hold that Judge Goldman's sentencing scheme was in violation of NRS 176.215(1).[5]

II. JUDGE LEHMAN'S CORRECTION OF THE ILLEGAL SENTENCE

NRS 176.555 provides that a district court may correct an illegal sentence at any time. Wicker claims that Judge Lehman erred by deleting the probation portion and ordering that Wicker serve the last four sentences. He contends that Judge Lehman's order was tantamount to the revocation of Wicker's probation without a probation revocation hearing and that it was inconsistent with Judge Goldman's intent that Wicker become eligible for with Judge Goldman's intent that Wicker become eligible for parole after approximately eight years in Prison. We disagree.

4. NRS 200.363, the statute under which Wicker was convicted, provided in relevant part:

> 1. Forcible rape is the carnal knowledge of a female against her will. A person convicted of forcible rape shall be punished:
>
> ....
>
> (b) If no substantial bodily harm results:
>
> (1) By imprisonment for life; or
>
> (2) By imprisonment for a definite term of not less than 5 years. Under either sentence eligibility for parole begins when a minimum of 5 years has been served.

In 1977, the legislature repealed NRS 200.363. *See* 1977 Nev.Stat. Ch 598 § 29 at 1635.

First, Judge Lehman's order did not revoke Wicker's probation; it eliminated it, pursuant to NRS 176.555. Second, the intent behind Judge Goldman's sentencing scheme was not simply to allow Wicker to be released on parole after serving time on the first two sentences. Judge Goldman clearly wished the court to retain jurisdiction over Wicker so that if Wicker violated probation, the court could execute the four suspended sentences. At this point, we decline to speculate regarding what sentences Judge Goldman would have given had he known that the sentencing scheme he employed was illegal. We merely decide whether Judge Lehman properly cured the illegal infirmity of Judge Goldman's sentencing structure.

Judge Goldman acted within his statutory sentencing authority in imposing the two consecutive fifteen-year terms for robbery and the four consecutive sentences of life with the possibility of parole for the count of

5. The fact that through some error, Wicker was not placed on probation following his initial 1988 release on parole further demonstrates the defects and unwieldiness of Judge Goldman's sentencing structure. For example, it is unclear how, practically speaking, such a sentencing scheme would be implemented. Must the Department of Parole and Probation, upon the granting of parole, be aware of the period of probation and the suspended sentences and place the defendant on probation itself, a duty usually reserved for the judiciary? Or must the district court monitor the defendant's status and discover when the defendant is placed on parole so that it may impose the period of probation? Or must the Department of Parole and Probation inform the district court of the defendant's parole status so that the district court may begin the period of probation? Perhaps it was the lack of an answer to these questions which accounted for the failure to commence Wicker's probation upon his initial release on parole.

rape and the three counts of infamous crime against nature. The only unauthorized portion of his sentences was the period of probation and the suspension of the last four sentences. In deleting the probationary period and ordering that the last four sentences be served rather than suspended, Judge Lehman eradicated the illegality of Judge Goldman's sentence.

Based upon the foregoing, we uphold Judge Lehman's order declaring Judge Goldman's sentencing scheme illegal and correcting the sentence.

STEFFEN, C.J., and YOUNG, J., concur.

JERRY'S NUGGET v. Keith Nev. **921**
Cite as 888 P.2d 921 (Nev. 1995)

ROSE, Justice, with whom SPRINGER, Justice, joins, concurring in part and dissenting in part:

I concur in the decision that the sentences given Wicker were illegal but object to how they were modified by the district court.

Wicker was given two sentences to serve for robbery and rape that ran consecutive to one another, and then was given the benefit of probation for the remaining four sentences, with probation to begin after the first two sentences were served. Obviously, suspending those four sentences to probation when probation would not begin for more than five years was illegal, but it was clear that the sentencing judge was giving some benefit to Wicker by not simply running them all consecutive to the first two sentences without probation.

Had the sentencing judge known that his probationary scheme for the four sentences was illegal, no one knows what he might have done. Since he was giving some sort of benefit to Wicker, he may well have run those four sentences

concurrent to the first two, or consecutive to the first two and concurrent to one another.

To correct the sentencing error, the district court removed the portion of the sentences beneficial to Wicker, but let the remainder of the sentences stand. While the sentences as modified are now legal, the sentencing package as it presently stands is far more punitive to Wicker than when pronounced.

Since we do not know how the sentencing judge would have modified his illegal sentences, we should remind this matter back to the district court for a completely new sentencing before a new district judge. In approving the modified sentences, Wicker's sentences are far more punitive than when first handed down and more harsh than the sentencing judge intended.

Date: April 16, 1996

To: Frank Cremen
Attorney at Law
302 East Carson Avenue
Suite 1004
Las Vegas, Nevada 89070

From: Robert David Campbell #21297
Southern Desert Correctional Center
P.O. Box 208
Indian Springs, Nevada 89070

Subject: Request For Affidavit
Concerning Case No. C-70346

Dear Mr. Cremen,

As per out phone conversation of today, April 16, 1996, I am sending you the information that you requested. As you can see by the Judgment of conviction, on counts III through VIII, I was sentenced to 10 years of each count. Although Judge Goldman did say 60 years, indicating that they were consecutive, NRS 176-035 says that the court must **pronounce** "...either concurrently or consecutively..." and that "...if the court makes no order with reference thereto, all such subsequent sentences run concurrently." I am not really interested in whether they are consecutive or concurrent. The problem is that they were and **are all illegal**. I am still, today, in jeopardy of my liberty interest.

As you know, I did a plea bargain concerning the charges, but I did **not** do a plea bargain for my **sentences**. This was left to the discretion of the court and, therefore, an issue to raise on direct appeal if there was a problem.

Appendix 25

The terms and conditions of the plea bargain are as follows: I was originally charged with Sexual Assault (Felony NRS 200.364, 200.366) Thirty-Three counts; Lewdness with A Minor (Felony NRS 201.230), Two counts. I agreed to enter a plea of guilty to Eight (8) counts of Statutory Sexual Seduction, One (1) count of Lewdness with A Minor and One (1) count of Infamous Crime Against Nature. The State reserved the right to argue at the time of sentencing.

As you can see from the attached Judgment of Conviction, Counts III through VIII are "...to begin **after** prison sentence is served." This was/is illegal. NRS 176.215 (see attached), which was in effect at the time of sentencing, clearly states that the period of probation must not be more than five years for a felony. (See attached copy of Wicker v. State, 888 P.2d 918 at 919 (Nev. 1995) concerning the legality of Goldman's sentences). I am still in prison more than 10 years and 9 months later completing Counts I, II, IX and X. I am currently on count X and will either get mandatory parole on it in August of this year or will expire it in March of 1997.

After Judge Goldman pronounced the sentences, you did not object. I might point out here that the State, also, did not object. I left the courtroom and was sent here to S.D.C.C. at Indian Springs, where I have been ever since. I did not know counts III through VIII were illegal, but I felt that something was wrong with the sentencing. While I was in the indiction center here, inmates told me that a sentence could be modified. I wrote to you on September 7, 1985, asking if Judge Goldman's sentences could be modified. I wasn't sure how or

what, but I felt that something was wrong.

I received your letter of Sept. 12, 1985, on/about Sept. 14, 1985. (See attached copy). In that letter, paragraph 2, you spelled out my sentences and stated that"...probation is not to begin **until your parole** on the offenses for which you are doing the 36 years." (Emphasis added), The court had pronounced the illegal sentences on July 31, 1985. You did not object and the State did not object to the illegal portion of the sentencing. After receiving your letter, I had no choice but to believe that the sentencing in my case was legal. In paragraph 3 of your letter, you told me that the only way I might get any redress was to go to-the State Pardons Board, when, in fact, I still had time to file a notice of appeal to the Nevada Supreme Court because my Judgment of Conviction was not stamp "FILED" until Sept. 13, 1985. (See attached J.O.C. "FILED" stamp at the top of page). I still had nearly a month to file a notice of appeal, under NRAP 4 (b), so that the issue of the illegal sentencing could have been raised on direct appeal. Since I had not plea bargained for the sentencing, any question as to the legality of that phase of the proceedings was appealable.

After receiving your letter, I did not do anything legally about my sentences. I believed them to be legal,. I did apply to the Nevada Pardons Board in 1987, as you had instructed me to do in your letter, but the Board denied my application. Since I believed the sentences to be legal, I never filed any kind of post-conviction remedy over the years, I had no reason to. On July 29, 1991, virtually 6 years to the day after

my sentencing, the State called me to the P&P Pre-Release Office here at S.D.C.C. and required that I sign a document stating that, upon my release from prison, I would immediately report to the Department of **Probation** for Probation supervision and that if I didn't, my failure to do so might result in the violation of my probation. (See attached copy of July 29, 1991 form). Six years later, the State is still telling me that I **MUST** do these probation sentences or have them revoked and be sent back to prison. If I had any doubts as to the legality of the probation sentences, these doubts were not gone. I truly believed that my probation sentences were legal. The court had pronounced them, my counsel did not object, and the State did not object. You told me that modification was not possible, when it was, and the failure to file a notice of appeal was without my consent.

You can imagine how shocked I was when I recently found the Wicker, supra, case. The Nevada Supreme court stated in Wicker, supra, at 919, "We not that nowhere in the statutory provisions regarding sentencing did the legislature authorize any sentence remotely similar to that imposed by Judge Goldman. In fact, NRS 176.215(1) prohibits this type of sentence. Pursuant to NRS176.215(1), the period of probation or suspension of a sentence may not exceed **five** years for the felonies committed in the case." (Emphasis added). I realized that Goldman's sentencing structure, on Counts III through VIII in my case, was/**is illegal**. I am in jeopardy of my liberty interest. If I went back to the state court, for any reason, Judge Lehman would order that my judgment of conviction be amended to delete the probation portion

of my sentences. The Nevada Supreme Court upheld his actions in the Wicker case. If I leave prison and sign my name at the probation department, as instructed, I agree to the illegal sentences. I had no place to go in the Nevada State Judicial system for redress. As you can see in Wicker, supra at 920 (last paragraph), the Nevada Supreme Court feels that Lehman's correcting the mistake by pulling the probation and imposing the sentence to be correct, "Based on the foregoing, we **uphold** Judge Lehman's order declaring Judge Goldman's sentencing scheme illegal and correcting the sentence." (Emphasis added).. The state judicial system's idea of "correcting" the illegal actions of one of its judge is ludicrous.

-2-

In Wicker, supra, at 921, Justices Rose and Springer concurred and dissented in part, "I concur in the decision that the sentences given Wicker were illegal but object to how they were modified by the district court. They go on to say, "had the sentencing judge known that his probationary scheme for the four sentences was illegal, no one knows what he might had done." (Emphasis added).

Mr. Cremen, if you had told Goldman, at the sentencing pronouncement on July 31, 1985, that his probation sentences were illegal, it could have been worked out at that time. (Pronouncement). I felt that something was wrong with the sentencing, but I didn't know exactly what. I see now that Goldman wanted control over me after I was released from prison, either by parole or expiration. This uncertainty about my sentences was what prompted me to write to you. When you wrote back and spelled out my sentences and told me that the only thing

that I could do was go to the pardons board, I took you at your word and did nothing, even though the sentences could have been modified or I could have filed a notice of appeal, as the Judgment of Conviction wasn't signed and filed until September 13, 1985, leaving me 30 days from that date to file the **NOTICE**. During the years, I could have gone back on habeas corpus or NRS 176.555 "The court may correct an illegal sentence at any time.", but I never had any reason to do so because I believed my sentences to be legal. I now have no choice but to go to the federal court and ask for my release under 42 U.S.C. 2254.

I called you and I am writing to you out of respect for you and the judicial system before I go to the federal court for relief. I am requesting that you assist me now by sending me an affidavit which includes the following:

1. I was the retained counsel of Robert David Campbell in Case No. C-70346 in the Eighth Judicial Court of the State of Nevada, In and for the County of Clark during the year of 1985 in Dept. X.

2. I represented Campbell at the sentencing pronouncement on July 31, 1985, before Judge Paul S. Goldman in Dept. X.

3. I did not object to any part of the sentencing, at pronouncement, and did not bring up to the court that the probation portions of Counts III through VIII were illegal.

4. I did not tell Campbell, in the courtroom following

sentencing, that I would file a notice of appeal or he should file a notice of appeal to the Nevada Supreme Court if he wanted to appeal any part of the sentencing phase of the proceedings. The failure to file a notice of appeal was without Campbell's consent.

5. Following the receipt of a letter from Campbell from the Southern Desert Correctional Center at Indian Springs, Nevada, dated September 7, 1985, I wrote him back in a letter dated September 12, 1985.

6. In my letter, I referred to Campbell's letter in which he asked about have the sentences modified.

7. In my letter, paragraph two, I explained his sentence structure to Campbell and told him that his probation sentences would not begin until he paroled on the offenses for which he was doing the 36 years.

8. Nowhere in my letter of September 12, 1985, did I mention the filing, either by me or Campbell, of a notice of appeal for direct appeal to the Nevada Supreme Court concerning the illegal sentences. Based upon the Court's pronouncement of the illegal sentences, my not objecting at sentencing and my telling Campbell, in the

letter, that the only avenue that he had for redress was the State Pardons Board, Campbell had no choice but to believe the sentences, in Counts III through VIII, were legal.

By the time you get this letter, I will have gone to the parole board for the last time. I go Monday, May 5, 1996. On my first 10 year sentence (Count I), I Served four years before being paroled to my second 10 year sentence (Count II). I served two years on Count II before being paroled to my third 10 year sentence (Count IX). I served two years on Court IX before being paroled to my last sentence (Count X), a 6 year sentence. I began this 6 year sentence on July 28, 1993. Although I did have to serve four years on my first 10 year sentence, I was paroled on my second and third 10 year sentences in the minimum time (2 years). Now there are new parole boards and the current board is making me expire this last sentence. All they told me is that I haven't served enough time. I am now going for the mandatory parole, but I don't think that I will get it as their minimum is 54 months. I really do not want parole now because if I get parole, I not only must report to the parole department, but also to the PROBATION department to sign up for Courts III through VIII, the ILLEGAL sentences. If I don't the probation department can take me back to court and have my probation revoked and have me sent back to prison. Since **Wicker**, supra, I know that Judge Lehman will do; pull the probation portion of the sentence and send me back to prison. The Nevada Supreme Court upheld his actions in Wicker, therefore I am in dire jeopardy of my liberty interest. If I sign up for the illegal

probation sentences, then I agree to them, therefore I will not sign up for them. I have nowhere in the state to go for redress, no place to exhaust my state remedies. The Judaical District Court and the Nevada Supreme Court's remedy for "correcting" such sentences is utterly ludicrous. I have no place to go except the federal court to ask for my unconditional release from the judgment.

This matter could have been resolved in 1985, but it wasn't. Now I am only asking that you give me your assistance of counsel by giving me the requested affidavit. The federal court demands documentation, especially in a case such as mine, in which I am asking for release from prison and the judgment.

I ask that you please, as soon as possible, respond with the requested affidavit or send me some communication as to your intentions, so that I may get my habeas corpus filed. Your assistance will be grately appreciated.

Sincerely,

"s/_____".
Robert David Campbell
S.D.C.C.
P.O. Box 208
Indian Springs, Nevada 89070

FRANK J. CREMEN
Attorney at Law

302 EAST CARSON
SUITE 1004
LAS VEGAS, NEVADA 89101

Telephone (702) 385-7475
FAX (702) 385-9703

May 7, 1996

Mr. Robert David Campbell
No. 21297
Southern Desert Correctional Center
P.O. Box 208
Indian Springs, Nevada 89070

Dear Mr. Campbell:

I am in receipt of your letter of April 16, 1996. It arrived today, May 7.

I do have some recollection of your case, and having read the materials that you enclosed, I can advise you that in my opinion, in 1985 when you were sentenced, I would not have though that the sentence that Judge Goldman Gave you was at all illegal. Having read the Wicker case, I can advise you that I would have reached a decision different that the Supreme Court with regard to its interpretation of N.R.S. 176.215.

Had the issue been raised, however, by either myself or you, I would have counseled you against appealing, because I would have believed that the sentence imposed would be more lenient than that which Goldman would have otherwise imposed. I would have suggested to you that your appealing what has now been determined to be an illegal sentence

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might well work to your detriment, in that Judge Goldman might give you a much more severe sentence.

This would still be my advice today.

Sincerely yours,

"s/_____".
Frank J. Cremen

FJC:bjp

AFFIDAVIT

STATE OF NEVADA)
)ss.
COUNTY OF CLARK)

CAL J. POTTER, III, ESQ., being first duly sworn, deposes and says:

That your Affiant is duly licensed to practice law in the State and District of Nevada and is admitted to practice before the United States Supreme Court.

That your affiant has reviewed the Petition for Writ of Habeas Corpus filed by Robert David Campbell and avers that in your Affiant's opinion the writ has merit and that it would be futile to remand the Petition to State Court because the issue has been previously exhausted in Wicker v. State, 111 Nev. 43, 888 P.2d 918 (1995), and Lozada v. Deeds, 498 U.S. 430, 111 S.Ct. 860, 112 L.Ed.2d 956 (1991)1 964 F.2d 956 (9th Cir. 1992); 871 P.2d 944 (Nev. 1994); 72 F.3d 135 (9th Cir. 1995)(Appeal after remand 964 F.2d 956).

Further Affiant sayeth naught.

"s/_____".
Cal J. Potter, III

SUBSCRIBED and SWORN to before me this 29th day of May, 1997.

"s/_____".
Jewelene Nelson
NOTARY PUBLIC

THE GREAT SEAL OF THE STATE OF NEVADA	NOTARY PUBLIC County of Clark State of Nevada Jewelene Nelson No. 96-5119-1 My Appointment Expires Nov. 8, 2000

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